TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 600

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

J. L. POWE, AS ADMINISTRATOR OF GEORGE A. MARSHALL, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

PETITION FOR CERTIORARI FILED DECEMBER 16, 1930

CERTIORARI GRANTED JANUARY 19, 1931

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[fols. 1 & 2] [Caption omitted]

[fol. 3]

IN COURT OF COMMON PLEAS OF CHARLESTON COUNTY

STATEMENT

This action was commenced in the Court of Common Pleas for Charleston County by service of summons and complaint on the defendant, which was filed in the office of the Clerk of Court for Charleston County on 30th May, 1924. The action was commenced in the name of C. M. Tyner as administrator of the estate of George A. Marshall, as plaintiff. C. M. Tyner subsequently died and by order dated 19th September, 1929 J. L. Powe who was appointed administrator of George A. Marshall, was as such administrator substituted as plaintiff.

It is alleged in the complaint and admitted in the answer that the action is brought under the Federal Employers Liability Act and amendments thereto.

The complaint alleges that plaintiff's intestate, George A. Marshall, was injured and killed on 16th January, 1923 while in the performance of his duties as a switchman employed by the defendant, by reason of the negligence, carelessness, recklessness, wilfulness and wantonness of the defendant in the particulars as set out in the complaint as hereinafter printed. The defendant duly answered denying liability and setting up as a defense the orders of the Railroad Commission of South Carolina of the 24th May, 1916 and October 11, 1916, as hereinafter set out in the testimony, and that it had complied with the regulations, and also setting up that the injuries and death of the said George A. Marshall were due to and caused by one of the risks of his employment assumed by him, and further pleading contributory negligence.

[fol. 4] The case was first tried on October 10, 1925 and a verdict for $28,800.00 rendered for the plaintiff, which was affirmed by the Supreme Court of South Carolina, and which was subsequently reversed by the Supreme Court of the United States and sent back for a new trial, and the case was again tried on the 7th, 8th and 9th of October, 1929, when a verdict for $30,000.00 in favor of the plaintiff was

rendered, upon which judgment was entered on the 5th December, 1929.

The defendant objected to certain of the testimony offered by the plaintiff, especially to the admission in evidence against it of the seventh article of its answer. The defendant at the close of all the testimony moved for a directed verdict on the grounds hereinafter stated, which motion was overruled. After arguments of counsel and the Judge's charge the jury retired to deliberate and returned a verdict in the plaintiff's favor for $30,000.00.

Thereafter within the time allowed by law the defendant served due notice of intention to appeal and also this transcript of record and the exceptions hereinafter set forth.

The pleadings allege and admit that both the deceased and the defendant at the time of the death of the decedent, were engaged in interstate commerce. At the time of his death George A. Marshall was employed by the defendant railroad company in the capacity of switchman and on the 6th day of January, 1923 that he met his death while in such employment. It was also admitted that he left surviving him as his sole heirs at law and distributees, his widow, Sallie T. Marshall, and three minor children, Ruby E. Marshall then five years old, James A. Marshall then [fol. 5] three years old, and George A. Marshall, Jr. then nine months old.

It was admitted in the trial that J. L Powe was the duly appointed administrator of the estate of said George A. Marshall and appeared in this action as such.

The pleadings also allege and admit that the defendant is and at the times therein mentioned was a railroad corporation organized and existing under the laws of the State of Virginia, and doing business in the county of Charleston, state aforesaid, and as such engaged in interstate commerce.

In Court of Common Pleas of Charleston County

Complaint

The complaint, leaving out the formal allegations already covered above and the caption, is as follows:

"Third. The defendant above named, Atlantic Coast Line Railroad Company, is now and at the time hereinafter

mentioned was a railroad corporation organized and existing under the laws of the tate of Virginia, and doing business in the county of Charleston, state aforesaid, and as such engaged in interstate commerce; and that the said George A. Marshall, while an employee of said railroad corporation as aforesaid, and while engaged in the duties incident to and growing out of his employment in running and operating one of defendant's trains engaged in interstate commerce, met with an accident at or near the city of Charleston, state aforesaid, on the 5th day of January, 1923, and was so badly injured as to cause his death soon thereafter.

"Fourth. That this action is brought against defendant, Atlantic Coast Line Railroad Company, under and pur-[fol. 6] suant to the provisions of the Federal Employers Liability Act (1908) and as amended.

"Fifth. On information and belief, that on said 6th day of January, 1923, said deceased, George A. Marshall, was engaged in the performance of his duties as a switchman attached to an engine and train of cars moving over defendant's main line of tracks at or near the city of Charleston, state aforesaid, and in the direction of said city; that it was dark and foggy, the time being about three o'clock in the morning; that while proceeding as aforesaid at or about Five Mile Crossing, near said city the said engine and train of cars were caused to be stopped by reason of trouble with the brakes on some of said cars, and that the said George A. Marshall in the course of his duty and employment got down to the ground to examine into and correct said trouble; that at or near the point where said engine and train of cars had stopped as aforesaid, defendant herein Atlantic Coast Line Railroad Company, its agents and servants, in violation of its duty to furnish for the use of the said George A. Marshall a reasonably safe roadbed and track free from obstructions which might be placed on the side of the track, and to place and maintain signal devices at a reasonably safe distance from the track, so as not to extend over towards the track in such close proximity as to endanger the lives of its employees who might be running or operating its trains by said signal devices, had placed and maintained a signal device or obstruction too close to the track, and in such close proximity to the track as to

leave an insufficient space intervening between it and the side of the train, and so close as to interfere with the proper operation of defendant's trains and the proper performance of their duties by its employees thereabout, so that [fol. 7] upon said train proceeding forward, and while the said George A. Marshall was mounting the ladder of one of the cars attached or while he was examining the defective car as aforesaid, the defects in which were due to the negligence of the defendant herein, thereby necessitating that said decedent examine the same, and while thus engaged in the duties incident to his employment, he was struck by said signal device or obstruction and thrown from his train and so badly injured as to cause his death soon thereafter.

"Sixth. That the injuries and death of the said George A. Marshall were caused by the negligence, carelessness, recklessness, wilfulness and wantonness of said defendant, Atlantic Coast Line Railroad Company, its agents and servants, as aforesaid, and in the following particulars, to wit:

"(a) In failing and omitting to furnish the said decedent a reasonably safe place to work.

"(b) In failing and omitting to furnish a reasonably safe roadbed and track free from obstructions.

"(c) In failing and omitting to place and maintain said signal device at a reasonably safe distance from the track.

"(d) In causing and allowing said signal device or obstructions to be placed and maintained too close to the track.

"(e) In causing and allowing said signal device or obstructions to be placed and maintained in such close proximity to the track as to leave insufficient space between it and the side of a train within which employees might safely perform the duties incident to their employment and the [fol. 8] proper operating of defendant's trains.

"(f) In causing and allowing said signal device or obstruction to be at the point, place and position the same was maintained.

"(g) In failing and omitting to notify or warn said decedent of the close proximity of said signal device or obstructions to the side of the train.

"(h) In causing and allowing a defective and bad order box car to be attached to and form a part of the train and to be transported by the engine to which decedent was attached.

"(i) In causing and allowing said engine and train of cars to be run at a high and dangerous and excessive rate of speed within the yard limits and block system of defendant and in violation of its rules and regulations governing the same.

"Seventh. That at the time of said accident and death of the said George A. Marshall, he was a married man and left surviving him his widow, Sally T. Marshall, and the three minor children heretofore named, all of whom were dependent upon said decedent for their support and maintenance; that said decedent at the time of the happening of said accident was earning one hundred and eighty ($180.00) dollars per month, was a young man of 25 years, strong, healthy and able-bodied, was kind and affectionate to his wife and children, and by reason of the negligent killing of said decedent his wife and children have suffered a great pecuniary loss.

"Eighth. That by reason of the aforesaid facts and injury and death of the said decedent, his wife and children have been injured in the sum of fifty thousand ($50,000.00) dollars."

[fol. 9] IN COURT OF COMMON PLEAS OF CHARLESTON COUNTY

ANSWER

The answer of the defendant, leaving out the caption, was as follows:

"First. It admits the allegations of the first, third and fourth paragraphs, and so much of the second paragraph as alleges that the said decedent, George A. Marshall, on the 6th day of January, 1923, and for some time prior thereto, was employed by the defendant railroad company in the capacity of switchman.

"Second. It denies each and every other allegation in said complaint not hereinabove or hereinafter specifically admitted.

"Third. Further answering said complaint and with specific reference to the subdivisions a, b, c, d, e, f and g in paragraph sixth of the complaint, and the other allegations in the complaint referring to the semaphore hereinafter mentioned, the defendant alleges that heretofore, to wit, on or about the 24th day of May, 1916, the Railroad Commission of South Carolina in Circular No. 211, amending Circular No. 208 with regard to clearances, unanimously adopted the following resolution:

" 'Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals;

" 'Be it resolved that no building, or platform, or other obstruction be allowed erected or maintained nearer than four feet of the outer edge of the nearest rail of the main or side track of any railroad in the State of South Carolina. This limit of clearance shall not apply to bridges already [fol. 10] constructed, or to passenger station landings.'

"A copy of which was served upon the defendant by said Railroad Commission; also, that on or about October 11th 1916, the Railroad Commission of South Carolina in Circular No. 216 with regard to clearances, adopted the following resolution:

" 'Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals:

" 'Be it resolved that no building, or platform, or other structure about station grounds be allowed erected or maintained nearer than four feet from the outside edge of the main or side track of any railroad in the State of South Carolina, measurement being made at rail top level; and furthermore, that no obstruction be allowed erected or maintained at any point other than station grounds nearer than four feet from the outer edge of the main or side track rail of any railroad in the State of South Carolina, measurement being made four feet about the top of the rail.

" 'This limit of clearances shall not apply to bridges already constructed, or to passenger landings.'

"A copy of which was also served upon this defendant by the said Railroad Commission.

"Fourth. That this defendant complied with the terms of the said resolution in the erection of the semaphore mentioned in the complaint, the same being at a greater distance than four feet from the outer edge of the n-arest rail of the track at the point as so required.

[fol. 11] "Fifth. Further answering said complaint and for a further defense to the said action, on information and belief the defendant alleges that the injuries and death of the said George A. Marshall was due to and caused by one of the risks of his employment assumed in working for the defendant, that is to say, the risk of riding on the side of a freight car and of passing various obstructions such as signal devices, semaphores and the like, whose presence was known to him and the dangers of which were obvious and so assumed by him.

"Sixth. Subject to defendant's motion to strike out certain allegations of the complaint with reference to defects in certain of the freight cars on the said train mentioned in said complaint, and subject further to its motion to make said allegations more definite and certain, in various particulars, and saving and reserving all its rights under said motions, and further answering said complaint and for a further defense to said action, on information and belief, the defendant alleges that the injuries and death of the said George A. Marshall were due to and caused by one of the risks of his employment, assumed in working for the defendant, that is to say, the risk of the work of a switchman about cars, with defects arising in the ordinary operation of the cars the occurring of such defects in such operation being reasonably in the contemplation of the parties when the deceased undertook to work for the defendant, and said defects in this case being obvious and actually known to the deceased and ordinarily incident to his employment.

"Seventh. Further answering said complaint, and for a further defense to said action, this defendant alleges that the injuries and death of the deceased were due to and caus-d by the negligence of the said deceased contributing [fol. 12] and combining and concurring with the alleged negligence of the defendant and constituting a proximate

cause thereof, without which the same would not have happened, in the following particulars, to wit:

"(a) In not going directly to the roof of the freight car on which he was riding as instructed by the conductors of said train, but in remaining on the side of the car, contrary to said orders and instructions.

"(b) In not keeping a proper lookout for the signal devices and other obstructions which are ordinarily erected on the side of tracks of the defendant, near said tracks.

"(c) In failing and omitting to keep a proper lookout for the semaphore mentioned in the complaint herein, whose presence and location were well known to the deceased.

"(d) In leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore erected at a greater distance from the track than is required by the regulations of the South Carolina Railroad Commission, hereinbefore set forth."

IN COURT OF COMMON PLEAS OF CHARLESTON COUNTY

Statement of Evidence

The plaintiff introduced the following testimony:

Mrs. SALLIE T. MARSHALL sworn.

Q. What is your name?
A. Sallie T. Marshall.
Q. Was Mr. George A. Marshall your husband?
[fol. 13] A. Yes, sir.
Q. When was he killed?
A. In 1923.
Q. What month?
A. January the 1st.
Q. How long had you been married to him before his death?
A. Six years.
Q. How old was he when he was killed?
A. 27.

Q. What was the state of his health when he was killed?
A. He was in perfect health.
Q. What was his weight?
A. About a hundred and sixty pounds.
Q. How many children have you?
A. Three.
Q. What are their names?
A. Ruby, James and Alton.
Q. How old are those children now?
A. Ruby is ten, James is nine and Alton is six.
Q. One of these little ones was born after the death of his father?
A. Yes, sir, the baby.
Q. What were your husband's wages at the time of his death?
A. About a hundred and eighty dollars a month.
Q. What did he do with his salary?
A. He always brought his check to me.
Q. He gave you his wages?
A. Yes, sir.
Q. Was he a good provider?
A. Yes, sir.

[fol. 14] Cross-examination:

Q. How long had you and Mr. Marshall been living in Charleston?
A. We were not here but three weeks when he was killed, we were here twice, the last time we did not live here but three weeks.
Q. He was working for the railroad?
A. Yes, sir.
Q. He was working steadily those three weeks?
A. Yes, sir.
Q. What was his work for the railroad?
A. Switchman.
Q. Where did he work, on the yard here?
A. Yes, sir, he worked on the yard but he was called off on a wreck.
Q. He worked between Charleston and Bennetts?
A. No, sir, he worked in Charleston but he was called off that night on a wreck when he got killed.
Q. He had worked for the railroad here before?
A. Yes, sir.

Q. How long?

A. I guess about three months, something like that.

Q. He was here from March to June?

A. Yes, sir.

Q. And he worked for the Atlantic Coast Line as a switchman all that time?

A. Yes, sir.

Q. He had been a railroad man at other times for the Coast Line?

A. No, sir, he never did work for them but twice, he worked in Florence.

Q. He worked twice here and in Florence?

A. Yes, sir.

[fol. 15] Q. How long did he work in Florence?

A. About two years.

Q. What was he doing there?

A. Switchman.

Q. For the Atlantic Coast Line?

A. Yes, sir.

Q. You say he made about a hundred and eighty dollars a month?

A. Yes, sir.

Q. Part of that he had to spend on his own living, buying his clothes and food?

A. Yes, sir.

Q. About how much of that did he give you for *you for* your support?

A. After he got his clothes he turned the rest over to me.

Q. It cost something to support him?

A. About thirty or forty dollars a month after he took out his he turned me over about thirty or forty dollars.

Q. Was that each week?

A. No, sir, a month.

Q. He turned over to you about thirty or forty dollars a month?

A. Yes, sir.

By the Plaintiff:

Q. That was after he paid the bills for the family he turned over thirty or forty dollars a month to you?

A. Yes, sir.

[fol. 16] ST. JULIAN A. MELCHERS sworn:

Q. Where do you live?

A. Charleston, S. C.

Q. What is your occupation?

A. Photographer.

Q. How long have you been a photographer?

A. About 35 years.

Q. At my request did you make some pictures of a semaphore on the Atlantic Coast Line R. R.?

A. Yes, sir.

Q. Will you look at these pictures I hand you and tell me if you made that picture?

A. Yes, sir, I made it.

Q. Is that semaphore 3911?

A. Yes, sir.

(Picture offered in evidence marked Exhibit A.)

Q. Look at that picture and tell me what that is?

A. That is looking south, the south bound track, the Coast Line track, the train here and the signal light there.

Q. Is that picture the same as shown in the other picture?

A. Yes, sir.

(Picture offered in evidence marked Exhibit B.)

Q. Look at that picture, what is that?

A. That is also 3911 signal post.

Q. What does that show?

A. Inbound Coast Line track giving the measurements on there.

Q. Did you make the measurements?

A. Yes, sir, I made these measurements, that is from base of signal post to outside rail four feet ten inches, base of signal post to outside cross ties three feet two inches, the [fol. 17] camera one hundred and fifteen feet from signal post, standing on the Coast Line track looking south from outside rail to top of base of signal post four feet 9 inches, outside cross ties to top of signal base three feet one inch.

Q. That is the Coast Line track there?

A. Yes, sir.

Q. What is this?

A. This is signal post 3901.

Q. Where is that signal post located with regard to signal post 3911?

A. This is about a mile north of that.

Q. North of 3911?

A. Yes, sir.

Objected to; that is another semaphore entirely.

(Picture offered for identification and marked Exhibit —.)

Cross-examination:

Q. When did you take those pictures?

A. September 11th, 1925.

Q. Now this picture showing the train of cars that was taken from what track, the Southern track?

A. I would have to see that to tell you, that is looking south.

Q. There are four tracks there?

A. I believe there are.

Q. Are not there two Southern tracks and two Coast Line?

A. Yes, sir.

Q. Which track were you on when you took this photograph, what was, or where was your camera located?

A. That is looking south, inbound track, train is passing [fol. 18] on the Coast Line track, I was standing right between the two tracks; I mean the Coast Line and the other of these, this is the Southern, I am standing on this track here, I had to move aside when this train came, I was over here at first and when this train was coming I had to get off and keep the focus and I moved over towards the Southern track.

Q. Your camera was between the Southern and Coast Line track?

A. Yes, sir, I am also on the track between those two, the train was coming and I had to get over.

Q. Are you not on the second Southern track?

A. From this angle I could not very well be.

Q. You were between the two Southern tracks?

A. Yes, sir.

Q. You crossed this Southern track?

A. Yes, sir, I was between the two Southern tracks.

Q. It made it quite an angle, how far off were you?

A. About a hundred and fifty feet I judge, this train was coming and I had to work pretty fast.

Q. Were you not standing on the south bound Southern track to make this picture, did not you say that the last time?

A. That has been 6 years ago, I can't remember.

Q. You would be more apt to be accurate at that time when it was fresh in your mind?

A. Yes, sir.

Q. Where was your camera when this picture was taken?

A. I was standing about a hundred and fifty feet from signal post when train was passing, etc.

Q. Was not your camera on the Southern track?

A. Yes, sir.

Q. You were standing at quite an angle?

[fol. 19] A. Yes, sir.

Q. You were standing on the outbound Southern track?

A. Yes, sir.

Q. You took these measurements?

A. Yes, sir.

Q. From the base of the signal post to the outside rail was four feet ten inches?

A. Yes, sir.

Q. From the base of the signal post to the outside rail four feet ten inches?

A. Yes, sir.

Q. That is the nearest rail to the signal post?

A. Yes, sir, the nearest rail.

Q. What do you call the base of the signal post?

A. Right here.

Q. How far up does that base extend?

A. That is a good height there, I did not measure the height, I could not say positively.

Q. The lower part of that semaphore is that signal box, you don't call the whole of that box the base?

A. No, sir, I call this here the base.

Q. That is three feet two inches?

A. Yes, sir.

Q. Then at a height of four feet above the top would there have been a little greater space between the semaphore and the rail?

A. Yes, sir.

JOHN MCCRADY sworn.

Q. What is your occupation?

A. Civil engineer.

[fol. 20] Q. How long have you been a civil engineer?

A. I have been practicing on my own account about 18 years.

Q. Have you done much work for the Atlantic Coast Line R. R. Co.?

A. From time to time I do.

Q. At my request did you make certain measurements with regard to semaphore 3911?

A. Yes, sir.

Q. 3901, 3906 and 3916?

A. I did.

Q. Will you look at this and tell me what that is?

A. That is a sketch showing the distance from base of semaphore to nearest rail as measured on several semaphores on the Atlantic Coast Line R. R. Co. just north of Charleston.

Q. On what day was that survey made?

A. Monday, September the 23rd.

Q. Of this year?

A. Yes, sir.

Q. Looking at your plat there will you state what is the measurement from the base of semaphore 3911 to the outer edge of the western rail of the Atlantic Coast Line R. R. track?

A. I measured it to be four feet five and a quarter inches.

Q. What is the measurement of semaphore 3906?

Objected to, that is a different semaphore, it is not a question about that semaphore, it is a question about the semaphore where this man is alleged to have been killed.

Court: Go ahead.

Mr. Young: I object; the semaphore in question is 3911 and he is asking him about another one.

Court: The objection is overruled.

[fol. 21] Q. Now, 3906, is or not that the semaphore just by the viaduct?

A. Yes, sir; just south of it.

Q. North of 3911?

A. Yes, sir.

Q. What is the distance from the base of that semaphore to the west rail of the Coast Line track?

A. Five feet nine inches.

Q. The other is four feet five and a quarter inches?

A. Yes, sir, where the man was hurt.

Q. What about 3901?

A. That measured seven feet, six and a half inches. That is just north of the viaduct.

Q. The distance from the west bound rail of the Coast Line to the base of that semaphore is what?

A. Seven feet six and a half inches.

Q. Now 3916, is or not that just south of 3911?

A. Yes, sir.

Q. What is the distance from the center of the west track of the Coast Line to the base of the semaphore there?

A. Six feet seven and three quarter inches.

Q. Where he was killed is what?

A. Four feet, five and a quarter inches.

Q. From the outside of the west rail, your measurements are all made from the west rail to the semaphore?

A. Yes, sir, the base of the bottom of the semaphore.

Q. I want you to show the jury on that plat what you call the base of the semaphore, is that or not a sketch of a semaphore?

A. Yes, sir, with the exception of the cross arm, here is what I call the base, the base has a jog in it three feet one and a half inches.

Q. Assume that to be 3911 that is how far from the [fol. 22] west rail of the Coast Line track to the semaphore?

A. Four feet five and a quarter inches.

Q. Assume that to be 3906 how far is that from the rail?

A. Five feet, nine and a quarter inches.

Q. Assume that to be 3901, how far is that?

A. Seven feet six and a half inches.

Mr. Young: I renew my objection to the plat being offered in evidence.

Court: The objection is overruled.

Cross-examination:

Q. Where 3906 is, that is on a curve?

A. I think 3906 is just beyond the curve a few feet, probably 20 or 30 feet south of the viaduct, the railroad is on

a tangent under the viaduct, 3911 is on a straight piece of track and 3906 is on a curve, I believe, or just near the curve.

Q. How far from the curve?

A. I did not measure it.

Q. Was it on a straight piece of track?

A. I would not be sure about that.

Q. How about 3901?

A. That is on a straight track.

Q. 3916 is that just by the Five Mile?

A. Yes, sir.

Q. Is 3916 south or north of 3911?

A. It is south.

Q. By the Southern Connection tower?

A. Yes, sir.

Q. That one has no base, just a straight pole?

A. You are thinking about the home signal that has no base, I am talking about 3916, that is a regular sema-

[fol. 23] phore.

Q. You made these measurements just recently?

A. Yes, sir.

Q. You do not know whether these were the locations of the semaphores and tracks on the 6th of January, 1923, do you?

A. No, sir.

Q. How did you make the measurements, with a steel tape?

A. 3911 I measured with a six foot rule, the others being further apart I used a steel tape.

Q. You did not make any measurements four feet above the rail?

A. No, sir, they were measured directly from the base of the semaphore about the same height as the rail.

Q. That semaphore box is at the height of about three feet more or less?

A. There is an offset of three inches.

Q. That would make that four feet, seven and a half inches there?

A. Yes, sir.

Q. The distance would be greater as you went higher?

A. It would be the same up to about six feet four inches then there is around six inches difference.

Q. You travel on the Coast Line quite frequently?

A. Yes, sir.

Q. They have these semaphores up and down the road?
A. Yes, sir.
Q. You don't know the distances of any except these four you have testified to?
A. I can't say off hand but they range from eight to ten feet, I have measured a number of them.
Q. Have you measured any others?
A. Not at this particular time, I was asked to measure [fol. 24] these particular semaphores which I did.
Q. Do you know when these semaphores were put in?
A. No, sir.
Q. They are a safety device?
A. So I understand.

By the Plaintiff:

Q. They are a block system?
A. I think so.
Q. They may or may not be very dangerous to employees?
A. I don't know much about the system, I think it is for the operation of trains.

Court: I take it that the plat with the measurements being admitted in evidence that you will show that at the time of this action that the situation was the same as at the time these measurements were made.

Testimony of J. J. Mansfield taken at the former trial of this case read to the jury, the witness having since died.
During the reading of this testimony Mr. Young objected to the witness giving his opinion about a mark on the post.

J. J. Mansfield sworn.

Direct examination.

By Mr. Logan:

Q. Captain, you are Coroner of Charleston County?
A. Yes, sir.
[fol. 25] Q. You have held that position for a number of years?

A. Yes, sir, about 13.

Q. When an accident happens do you try to inform yourself of the circumstances under which it happens?

A. Yes, sir.

Q. As official Coroner of this County?

A. Yes, sir.

Q. Did you or not in the course of your duty have occasion to investigate the circumstances surrounding the death of George A. Marshall?

A. I did.

Q. Did you go to the scene of the accident?

A. I did.

Q. Did you or not examine the signal device where he was killed?

A. I did.

Q. Did you investigate to see if there was a mark where he was struck?

A. I did.

Q. Did you find a mark?

A. I did.

Mr. Figg: I object, he cannot give any opinion of the cause of it.

Court: I think he can describe the mark and give his judgment, the jury is not bound by his judgment.

Q. You did go up there and examine this pole?

A. Yes, sir.

Q. Will you state what you saw?

A. I would like to start from my telephone call.

Q. No, sir, tell what you saw.

A. After getting to the scene of the accident and finding Mr. Marshall dead between the tracks I went north about 25 feet and found on the east side of the pole about 4 or 5 inches from the ground the dew was brushed off about this [fol. 26] space 12 or 15 inches.

Q. On the side of that pole the dew was brushed off?

A. Yes, sir.

Q. You found Mr. Marshall a few feet south of that pole?

A. Between 20 and 25 feet.

Q. Were you there when the railroad made experiments to find out whether a man would strike that pole?

A. No, sir.

Q. You then subsequently held an inquest over this man's body?

A. Yes, sir.

Q. Did at that inquest Mr. Hartzog, the engineer of that train testify?

A. Yes, sir.

Cross-examination.

By Mr. Figg:

Q. Was it dark when you got there?

A. Yes, about three-thirty in the morning.

Q. Did you find anyone at the scene of the accident standing around?

A. I met the engineer and conductor.

Q. Were there a number of people standing around there, more than four or five?

A. I judge so.

Q. Were there more than ten?

A. I would not say so.

Q. I want you to indicate on this picture where that dew rubbing was found by you?

A. I judge around here on the east side of the pole.

Q. Will you mark with a pencil about where that mark was? I am asking you to tell where the dew was found rubbed off, you looked at it?

[fol. 27] A. Yes, sir.

Q. Just about where was it?

A. That is the base here, what is the height of the base?

Mr. Figg: I don't know.

Witness: The base may be two or three feet, I don't know.

Q. Was the mark on the base or the pole?

A. On the east side of the pole.

Q. Mark about that point?

A. Not until I get the information about the distance.

Q. Would you say it was on the round part of the pole?

A. I would say four or five feet from the ground.

Q. On this round part of the pole?

A. I would say on the signal light four or five feet from the ground.

Q. Did you make any investigation of the body of Mr. Marshall?

A. We brought him down about 8:20 and delivered him to Mr. Connelly.

Q. Did you examine his body to see what caused his death?

A. I did not.

Q. Did you look on his body for any marks to indicate if he struck anything?

A. No, sir.

Q. Did you make any measurements on the body?

A. No, sir, the undertaker does that.

C. A. Rice sworn.

Q. Where do you live?

A. Columbia, S. C.

[fol. 28] Q. How old are you?

A. 37.

Q. What is your occupation?

A. I work in the construction department of the State Highway Department.

Q. How long have you worked with them?

A. Seven years.

Q. Where did you work before that?

A. I was working at Hartsville building bridges for Tinderlake and Lewis.

Q. Where were you living in January, 1923?

A. At Mr. C. M. Tyner's residence at Hartsville, S. C.

Q. Was he the father of Mrs. Marshall?

A. Yes, sir.

Q. He has since died?

A. Yes, sir.

Q. Did you know George A. Marshall?

A. Yes, sir.

Q. Did you see Mr. George A. Marshall after his death when he was laid out?

A. Yes, sir.

Q. Where did you see his body?

A. In Mr. Tyner's home.

Q. That was the second of January, the day after he was killed?

A. Yes, sir.

Q. Was or not your attention called to the condition of Mr. Marshall's head?

A. Yes, sir.

Q. Did you look at his head?

A. I was shown his head; I did not touch the body.

Q. What did you see?

A. A plaster of some kind on the back of his head, his hair was long.

[fol. 29] Q. There was a plaster of some kind on the back of his head?

A. A cloth of some kind, I don't know what it was, I did not investigate it.

Cross-examination:

Q. You saw him in the coffin?

A. Yes, sir.

Q. On his back?

A. Yes, sir.

Q. You don't know what the extent of the injury was, you just saw a plaster on his head?

A. There was a cloth there of some kind, that is all I know.

Doctor J. L. Powe sworn.

Q. Doctor Powe, have you been appointed administrator of the estate of George A. Marshall?

A. Yes, sir.

Q. In the place of Mr. Tyner, who has since died?

A. Yes, sir.

(Letters of administration offered in evidence.)

Q. What is your profession?

A. Practicing physician.

Q. How long have you been practicing?

A. Since 1904.

Q. Where did you graduate?

A. At the Medical College at Charleston.

Q. Where do you practice now?

A. Hartsville, S. C.

[fol. 30] Q. How long have you been practicing there?

A. Since 1904.

Q. Doctor Powe, did you know George A. Marshall?

A. I did.

Q. At the request of his family did you have his body exhumed?

A. I did.

Q. Who was present at that time?

A. The undertaker, Mr. L. L. Brown of Hartsville, and C. M. Tyner, who has died since, and a negro man, Baby Ray, they call him, and two or three other parties, I don't remember who they were.

Q. Do you remember when that exhumation was made?

A. During February, 1929.

Q. Do you know whether or not Mr. Brown, the undertaker was the same gentleman who buried Mr. Marshall?

A. I do; he was.

Q. Did you make an examination of the head of Mr. Marshall?

A. Yes, sir the skull.

Q. Did you see the body before he was buried?

A. I did.

Q. Do you recollect any marks connected with his head?

A. I made no regular examination of his body, I made a casual examination and found some bandages on the back of his head.

Q. When the body was exhumed did you examine his skull?

A. I did.

Q. Have you that skull here?

A. I have.

Objected to as irrelevant.

Court: If he identifies it I think it would be relevant.

Q. Is that the skull of George A. Marshall?

[fol. 31] A. Yes, sir.

Q. What had happened to that skull?

A. It is rather hard to tell what had happened to it, I can tell you what the condition of the skull is, the posterior part of the skull was absolutely crushed in, that is the back of the head.

Q. The back of the head was crushed in?

A. Yes, sir, here are the bones here, all that was crushed in.

Q. Have you a normal skull here?

A. Yes, sir.

Q. I want you to show the jury from the normal skull what happened to this poor young man's head?

Mr. Young: I object to that. A lot of things might have happened since that time, it has been 6 years ago since the man was buried.

Court: He testified that he saw it put into the coffin, or before it was put in the coffin and if he can testify that when it was taken out of the ground it was in the same condition I think it would be all right.

Q. Were there any signs of disturbance of that body or the grave?

A. None whatever, it was in the public cemetery at Hartsville.

Q. You are sure that is George A. Marshall's skull?

A. I have no reason to believe otherwise.

Objected to, the witness does not know if that is the man's skull or not.

Court: I could not shut it out up to now.

Q. I want you to bring the normal skull and show the jury where this man was injured?

A. One way I identified the correct skull is that he had a bandage on the back of his head like he did when he was put away, you could tell there had been a bandage there [fol. 32] on account of the color of his head there, and there was no disturbance around the grave at all. Now here is where the man got the lick, all this was turned in, the posterior of the skull, the occipital bones and the bones on each side were crushed in the spine cord passing through here.

Q. What did that indicate?

A. That he had received a terrific blow in the back part of the head.

Q. So terrific that his skull was completely crushed?

A. Yes, sir.

Q. Was or not the neck broken?

A. Yes, sir.

Q. His spine was completely torn apart?

A. I would not say broken I would say disarticulated.

Q. Doctor, assume that a man's head came in contact with an iron semaphore with a train going 20 miles an hour could or not it have inflicted such an injury as you saw there?

A. Well I would judge so.

Q. Now, Doctor Powe, could a human skull deteriorate like that skull has in 6 years unless it was buried like that?

A. There is no deterioration in the skull; it is in perfect condition; here is a skull that is 27 years old.

Q. So that skull is just in the condition in which it was buried?

A. Yes, sir, there is no deterioration in it.

Q. What would be the effect of such a blow as would crush a man's skull as is shown in this case?

A. I would say he would be killed suddenly, he would die very quickly.

Q. That blow would cause sudden death?

A. Yes, sir.

[fol. 33] Q. Doctor Powe, with the condition of the skull of Mr. Marshall as you found it do you think that it is possible that that condition could have been produced from a man falling from a train on the ground?

A. I do not.

Q. You think that is impossible?

A. Yes, sir.

Q. Do you think that it would have been necessary to have a terrific blow to cause that injury?

A. He would have had to have a terrific blow in the back part of the skull.

Cross-examination:

Q. You were the family physician of Mr. Tyner at Hartsville?

A. Yes, sir.

Q. And have been for years?

A. Yes, sir.

Q. He lived there before his death?

A. Yes, sir.

Q. You saw the body of Mr. Marshall when it was brought there to be buried?

A. Yes, sir.

Q. You knew then that the back of the head was crushed in?

A. No, sir.

Q. You made an examination of him?

A. I made a casual examination, no autopsy?

Q. From that examination you knew the whole back of his head was crushed in?

A. No, sir; I did not know that.

Q. That was a very severe blow that killed him?

A. Yes, sir.

[fol. 34] Q. That blow would cause instant death?

A. Yes, sir, I would say so.

Q. You don't know, of course, what struck him, or what he struck?

A. I do not.

Q. His head coming in contact with any hard object at some speed would have caused that breaking of his skull?

A. I would say some speed, I would say considerable speed.

Q. The condition of that skull was caused by coming in contact with force with a hard object?

A. Yes, sir.

Q. But you don't know what force or what object?

A. No, sir.

Q. When did you exhume the body?

A. About the middle of February, 1929.

Q. At whose instructions did you do that?

A. Mr. Grace and Mr. Tyner.

Q. How did you locate the grave?

A. Mr. Brown, the undertaker, was the one who located the grave.

Q. You did not locate it?

A. I located it by the marks on the grave, it did not have any tombstone, an ordinary tin mark, that is all, I saw no tombstone.

Q. You could not say of your own knowledge that that was Mr. Marshall's grave?

A. I could beyond a doubt.

Q. I say of your own knowledge,—the undertaker told you that was his grave?

A. I don't know if I asked him that question.

Q. He took you to the grave?

A. I went there myself.

Q. How did you locate the grave?

[fol. 35] A. Because the undertaker was present at the grave.

Q. It was on his information that you located it?

A. I could have located that grave from the fact that he was buried there.

Q. You were not present at the funeral?

A. No, sir.

Q. You only know from what some one told you that that was his grave?

A. Yes, sir, I will have to say that.

Mr. Young: I move to strike out that testimony.

Mr. Logan: I will put up the undertaker.

Court: All right, I will let it stand until we hear from him.

Q. The skull was not exactly in that same condition when you took it out of the grave, did not you have to boil it two days?

A. Of course, there was a lot of skin on it, it was mumified, we had to clean it up, it was all crushed to pieces and I got the pieces.

Q. You had to cut the head off the body?

A. Just pulled it loose.

Q. The head was attached to the body?

A. Yes, sir.

By the Plaintiff:

Q. Doctor Powe, is there any doubt in your mind that this skull that you have produced here was in that condition when the man was buried?

A. Not a bit, no doubt whatever.

Q. Actually in the same condition, that it is in now?

A. Yes, sir.

Q. You also saw the man laid out?

A. I saw him in the soffin.

[fol. 36] Q. And you saw certain bandages on his head?

A. Yes, sir, on the back of his head.

Q. And when the body was exhumed the bandage was on the back of his head?

A. Yes, sir.

Q. Is there any doubt that that is the body of George A. Marshall?

A. Not any more than that is your body.

Q. Now you have been asked about death being instantaneous, assume a man riding on the side of a train and

striking an object——

Mr. Young: I object to that.

Court: Go ahead.

Mr. Young: There are no facts in evidence to assume that from.

Q. Assume that he came in contact with a semaphore would he fall right off of the train?

Mr. Young: I object to that as leading and assuming facts not proved, before you can put a hypothetical question you have to prove some facts on which to assume the question.

Court: Go ahead, the objection is overruled.

Q. Would the man have fallen instantly or would he have been carried some distance from the momentum of the train?

Mr. Young: I object to that and move to strike it out; that is not a question of medical testimony as to the speed of the train, the doctor said the man was killed instantaneously, I don't think he is an expert on what the train would do.

Court: I will let it stand, the objection is overruled.

Q. In your opinion would you say he was rendered instantly unconscious and killed instantly by the blow?

A. I would say so.

[fol. 37] Q. He would immediately relax?

A. I don't know so much about that, he might have a grip that might not relax suddenly but by degrees, I have had things like that to happen.

Q. If he relaxed slowly and the train was going at a speed and he was carried past the object that hit him, there is no doubt he had a violent blow and if he relaxed gradually when he hit the ground he was unconscious?

A. Oh yes, he was knocked entirely unconscious when this thing struck him.

Q. If the train was going at a speed the force would throw him in the direction that the momentum carried him?

A. It was in the back of the head, it might have knocked his head around, not necessarily thrown him anywhere.

Q. The testimony of the Coroner is that he was found some feet from the semaphore? If he had fallen from a

train moving at a considerable speed he would have naturally made some marks on the ground?

A. He might have rolled over after he struck the ground but I understand he was not dragged but I don't know anything about that.

L. L. Brown sworn.

Q. Mr. Brown, where do you live?

A. Hartsville, S. C.

Q. How long have you lived there?

A. All my life.

Q. You are how old?

A. 29.

[fol. 38] Q. What is your occupation?

A. Undertaker.

Q. Mr. Brown, did you know George A. Marshall?

A. I did.

Q. Do you remember his body being exhumed?

A. Yes, sir, I do.

Q. Was or not Doctor Powe present when it was exhumed?

A. He was.

Q. Did you know where the grave was where you buried that man?

A. Yes, sir, I had it marked.

Q. When you saw the remains was there any doubt in your mind whatever that that was George A. Marshall?

A. None at all.

Q. And Doctor Powe was present when the body was taken out of the coffin?

A. Yes, sir.

(Skull offered in evidence.)

J. A. Manning sworn.

Q. What is your name?

A. J. A. Manning.

Q. Mr. Manning, where do you live?

A. On Brigade street.

Q. Were you or not formerly in the employ of the Atlantic Coast Line Railroad Company?

A. Yes, sir.

Q. Up until when?

A. March 2nd, 1929.

Q. What was your position at that time?

[fol. 39] A. Yard foreman.

Q. How long have you been a railroad man?

A. Well, I have been in actual train service about 11 years.

Q. Are you or not familiar with the work of switchmen, and brakemen and yard conductors on railroad trains?

A. Yes, sir.

Q. Are you familiar with semaphore 3911?

A. Yes, sir.

Q. Are you or not familiar with the location of semaphore 3906?

A. Yes, sir.

Q. Is or not 3906 just south of the viaduct?

A. Yes, sir, a few feet south of it.

Q. Are you familiar with the location of semaphore 3901?

A. Yes, sir.

Q. Where is that?

A. Just north of the viaduct on the main line.

Q. How about 3916?

A. Yes, sir.

Q. Where is that?

A. On the east side, north bound main line just south of 3911.

Q. Were you familiar with those semaphores in January, 1923?

A. Yes, sir.

Q. Have or not the location of those semaphores been changed in that period of time?

A. No, sir.

Q. They are just like they were before.

A. Yes, sir.

Q. Knowing the location of semaphore 3911 and assum-

[fol. 40] ing a body found 29 to 25 feet south of that how fast would you say a train was going——

Objected to. I don't think he is an expert.

Court: Let him answer the question first.

Q. I understood you to say you had been in the railroad business 11 years.

A. Yes, sir.

Q. What did your duties consist of, did they or not consist of riding on trains and box cars.

A. Yes, sir.

Q. Could you possibly tell or not how many times you have ridden on the tops or sides of cars.

A. No, sir, that is impossible.

Q. Have or not 11 years of your life been devoted to the business?

A. Yes, sir.

Q. Are you or not acquainted with the speed of trains?

A. I should say fairly good.

Q. Now, Mr. Manning, having seen semaphore 3911, the Coroner said he found the body 20 or 25 feet south of that what would you say was the speed of the train that threw him there?

Objected to. He has not qualified as an expert on moving bodies there is not any proof yet that any train went by the semaphore.

Q. Have you or not ever seen packages or sacks thrown from moving trains?

A. Yes, sir.

Q. Have you or not seen mail sacks thrown from moving trains?

A. Yes, sir.

Q. And packages and objects and bags of various kinds from time to time at railroad depots?

[fol. 41] A. Yes, sir.

Q. Do you mean moving trains or standing trains?

A. Moving trains.

Objected to. That is purely opinion testimony, every day knowledge and I submit the question is not proper.

Court: I will let him give his testimony, his opinion about it and the jury can attach whatever importance they wish to it.

Q. What would you say the speed of that train was?

A. I should say between 25 and 30 miles an hour.

Q. Now, Mr. Manning, having, as you say, ridden on trains so many times that you cannot tell the number is there or not a certain sway to moving box cars?

A. Yes, sir.

Q. Assume a train moving at a speed of 20 or 30 miles an hour what would be the sway of a box car?

A. I would say 10, 14 to 16 inches.

Q. That would be the sway of the box car from side to side?

A. Yes, sir.

Q. Now, are you familiar with the duties of a switchman?

A. Yes, sir.

Q. Is there or not any particular place that a switchman has to ride on the car?

A. No, sir, not any particular place.

Q. Does that not depend on the duties he is performing at that particular time?

A. Yes, sir.

Q. That would depend entirely on the duties he was performing at the time?

A. Yes, sir.

Q. Is not it a part of the switchmen's duties to pro-
[fol. 42] tect the railroad's rolling stock?

A. Yes, sir.

Q. Is or not it a part of his duties to watch the brakes or anything that might get out of order about the cars?

A. Yes, sir.

Q. Assuming that something did get out of order would it or not be a part of his duty to find out what was out of order?

A. Yes, sir.

Q. In order to find that out would he or not have to ride whereaver his duties at that particular moment called him?

A. Yes, sir.

Q. Are or not box cars equipped with ladders?

A. Yes, sir.

Q. Do those ladders extend from the side of the cars?

A. From the side and also the end.

Q. What are those ladders put there for?

A. For the employees to use, go up and down.

Cross-examination:

Q. Did Mr. Marshall work with you at all?

A. Yes, sir, a few times.

Q. Whereabouts did you work with him?

A. In the Coast Line yard.

Q. Out in the freight yard at Columbus Street and Bennett's Yard?

A. I don't remember him ever going out there with me.

Q. All of you go out to Bennett's Yard, that is where they make up trains as well as here?

A. Yes, sir.

[fol. 43] Q. And he must necessarily have gone out there?

A. Yes, sir.

Q. You don't know anything about the sway of any particular box bar you know all of them sway?

A. It is according to the bearings; some sway more than others.

Q. All sway, and all railroad men know that?

A. Yes, sir.

Q. Any man working as a switchman knows that they sway?

A. Yes, sir.

Q. When you say they sway, you mean the top sways?

A. All of it sways down to the truck.

Q. The whole car moves?

A. Yes, sir, except the truck.

Q. It moves more at the top than the bottom?

A. Yes, sir, the car is fastened to a plate, there is a plate that holds it and a pin and a center plate, a heavy piece of metal.

Q. That would let the top sway but not the whole bottom?

A. The whole box car would have some sway.

Q. It is fastened to the trucks?

A. Yes, sir with a pin.

Q. And the center plate?

A. The center plate is like that.

Q. With a pin in the center?

A. Yes, sir.

Q. The trucks are the part that contain the wheels?

A. Yes, sir.

Q. The wheels have a flange that holds them on the track?

A. Yes, sir.

Q. The guage of the track if four feet seven and a half [fol. 44] inches?

A. I am not sure of that, four feet and something.

Q. The flange of the wheel does not fit exactly like a machine bearing there is a little play in there?

A. Yes, sir.

Q. Very little or the cars would be derailed all the time?

A. Yes, sir.

Q. The center bearing or the side bearing, there is a piece across the truck?

A. Yes, sir, the bolster.

Q. Then there is a bearing on either side of that outside of the center plate, a plate attached to the car and bolted and when they come together that is as far as the car can sway?

A. Yes, sir.

Q. What is the clearance on that?

A. Some are more than others.

Q. All railroad men know that the cars sway?

A. Yes, sir.

Q. You say you were familiar with semaphore 3911?

A. Yes, sir.

Q. Marshall had passed there many times?

A. Not so many times, he had not been in this yard as long as I had.

Q. He had been here about three months in 1922, that is the time you worked with him?

A. Yes, sir.

Q. Then he came back in December 1922 and worked until the time of his death?

A. Yes, sir.

Q. His work during that time took him constantly up and down the road?

A. Yes, sir.

[fol. 45] Q. The movement between the Charleston and Bennett Yard is known as a main line movement?

A. The engineers call it a main line movement.

Q. The through trains run over that piece of track?

A. Yes, sir.

Q. It is not yard track?

A. No, sir.

Q. The semaphores were put up about 1916?

A. I don't know, I was not here then.

Q. They were there some time before you were here?

A. Yes, sir.

Q. You came here in 1918?
A. I was ten years on the Coast Line.
Q. How long did you work here?
A. Ten years, since 1919.
Q. The semaphores were in the same condition when you came here?
A. Yes, sir.

A. C. KLECKLEY sworn.

Q. Where do you live?
A. On Spring street.
Q. 200 Spring Street?
A. Yes, sir.
Q. What is your occupation?
A. Railroad employee.
Q. Who are you employed by?
A. The Southern Railway.
Q. How long have you been in the railroad business?
A. Thirty odd years.
Q. Are you familiar or not with the movement of rail-
[fol. 46] road cars?
A. Yes, sir.
Q. Do you know whether or not in the movement of these cars they sway?
A. Yes, sir.
Q. About what would you say is the swaying movement of a car—assume a speed of 20 miles an hour?
A. Between ten and twenty inches.
Q. Have you or not seen that semaphore 3911?
A. I could not tell by the number.
Q. Is that a pretty fair picture of that?
A. Yes, sir, I have seen that near five mile.

Cross-examination:

Q. What is your occupation?
A. I work for the Southern Railroad.
Q. What are your duties?
A. I am in the oil house at the present time.
Q. How long since you have run on the road?
A. 1925.
Q. What were you doing in 1920?

A. Conductor in passenger service.

Q. How long since you have run on freight trains?

A. Since 1910.

Q. You did not know much about the sway of box cars in 1923?

A. I don't know, I could not say, but the sway is there.

Q. You did not know anything about it in 1923 that was 13 years after you stopped running on freight trains?

A. Yes, sir.

Q. Is not that a fact?

A. Yes, sir.

Q. You just know that box cars sway because all rail-
[fol. 47] road men know that?

A. Yes, sir.

Q. All of them know that?

A. Yes, sir.

Q. 20 or 25 miles an hour is not fast for a train to run these days?

A. No, sir.

Q. If a box car sways 20 inches at 25 miles an hour how much would it sway at 50 miles an hour?

A. They don't run that fast. The maximum speed of freight trains now is 30 miles an hour.

Q. You are in the oil house now?

A. Yes, sir, but I know from what they used to do.

Q. How do you know that?

A. Because they are scheduled.

Q. You study the schedules?

A. Yes, sir.

Q. How long ago did you study them?

A. I could not tell you what date.

Q. How often have you studied them?

A. Once in a while I get hold of one and overlook it.

Q. What schedules have you studied?

A. I could not tell you now; most of them.

Q. What is the running time on a through freight train on the Coast Line from here to Florence?

A. I could not tell you.

Q. You have not studied that?

A. I never have run a train on the Coast Line.

Q. You don't know the speed of Coast Line trains?

A. I could not say that I do, but the maximum speed of a freight train is 30 miles an hour.

Q. On the Southern Railway?
A. No, on most any railroad.
Q. But you don't know the speed on the Coast Line?
[fol. 48] A. No, sir.
Q. Mr. Kleckley, another thing, the sway of the box car that is on the top?
A. All over the car.
Q. You men all know cars move that way?
A. Yes, sir.
A. Yes, sir, up and down and sideways.
Q. You don't mean the top only, the whole car?
A. Yes, sir, the whole car.
Q. The bottom as well as the top?
A. Yes, sir.
Q. How is the bottom fastened to the trucks?
A. The body is placed on the trucks?
Q. How is it fastened?
A. It is fit with a center plate and center pin.
Q. That is a heavy piece of steel?
A. I suppose so.
Q. That is attached to the bolster?
A. Yes, sir.
Q. That is a very heavy beam going across the truck?
A. Yes, sir.
Q. The center plate is like a cup and saucer they fit in like two pieces and the center pin is through the center of that, is not that correct?
A. Yes, sir.
Q. When you say the box car sways ten to twenty inches you mean it sways ten inches and twenty on the other?
A. Yes, sir, back and forward.
Q. Ten to twenty inches out of plumb on that side and then on the other side?
A. Yes, sir,
Q. I am not a railroad man and I want to understand it. It goes ten to twenty inches over this side and sways and [fol. 49] goes ten to twenty inches on this side?
A. Yes, sir.
Q. That is known to all railroad men?
A. Pretty well any man working for a railroad company.
Q. Any man working as a switchman on a train is bound to know that?
A. Yes, sir.

C. C. Tyner sworn.

Q. Where do you live?
A. Florence, S. C.
Q. Did you know Mr. George A. Marshall?
A. Yes, sir.
Q. What relation was he to you?
A. A brother-in-law of mine.
Q. Did you testify at the last trial of this case?
A. No, sir.
Q. Why not?
A. I was appointed administrator of the estate of Mr. Marshall and I tried to make a satisfactory settlement with the company.
Q. You did not testify?
A. No, sir, I asked you not to use me as a witness because I was connected with the Atlantic Coast Line Railroad Company.

Mr. Young: I object to his reason for not testifying. That is no part of this case.

Q. Were you or not subpœnaed to appear in this trial?
A. Yes, sir.
Q. What is your present occupation?
[fol. 50] A. Yard foreman for the Atlantic Coast Line Railroad Company in the Florence yard.
Q. Did you know Mr. Crawford, who was the conductor of the train at the time Mr. Marshall was killed?
A. Yes, sir.
Q. How does your present position compare with the work he was doing at that time?
A. I hold the same position that Crawford held at that time.
Q. Now, Mr. Tyner are you familiar with the location of semaphore 3911?
A. Yes, sir.
Q. Where is that semaphore?
A. Just north of Stoney curve?
Q. Do you know where 3906 is?
A. Yes, sir; that is north of 3911.
Q. Do you know where 3901 is?
A. Yes, sir, that is north of 3906, just beyond the bridge.
Q. Do you know where 3916 is?
A. Yes, sir, that is south of 3911.

Q. Were you or not familiar with the location of those semaphores in 1923 when Mr. Marshall was killed?

A. Yes, sir.

Q. Do you know whether or not they are in the same position now as they were at that time?

A. I think they are in the same position now that they were in 1923.

Q. Now, Mr. Tyner, were you in Charleston the day that your brother-in-law, Mr. Marshall, was killed?

A. Yes, sir, my sister wired me and I came down on 83 on the morning of the 6th.

Q. Did you see Mr. Crawford that day?

A. Yes, sir, I saw him that day.

[fol. 51] Q. Did you or not go to semaphore 3911?

A. Yes, sir, I went to semaphore 3911.

Q. Did you make any investigations as to the conditions around there?

A. Yes, sir, I examined the semaphore casing and surrounding conditions.

Q. What did you find?

A. I found about four feet from the base of the semaphore apparently something had wiped the smoke and soot off the semaphore and about six or seven inches further apparently blood stains on the north side of the semaphore casing.

Q. Now, Mr. Tyner did you see your brother-in-law after he was laid out after his death?

A. Yes, sir.

Q. Where was that?

A. At my father's home at Hartsville.

Q. Who was there at that time?

A. Mr. C. A. Rice.

Q. Was Mr. C. A. Rice the gentleman who testified here?

A. Yes, sir.

Q. Did or not anything attract you about the appearance of Mr. Marshall's head, or anything?

A. There was a blood clot on each side of the neck and I raised his head out of the coffin and examined his head and found a pad on the back of his head put there I imagine to absorb the blood, and I felt back there and the back of his head was all crushed in, was all soft and I called Mr. Rice's attention to the fact.

Q. Now, Mr. Tyner, how long have you been employed by the Coast Line?

A. I have been employed by the Coast Line since April 9th, 1918.

[fol. 52] Q. In what position did you first work when you went with the Coast Line?

A. I hired as a flagman on the Charleston district under Bo Bennett between Charleston and Savannah.

Q. Were you in yard service?

A. No, sir, I was in main line service, but I ran in and out the yard, I was familiar with the location of the yard.

Q. Are you or not obliged to be familiar with the place where brakemen or switchmen must ride on the train?

A. Yes, sir.

Q. Is that part of your duty?

A. Yes, sir.

Q. Is there or not any particular place on which a man must ride on a box car while it is moving or does he have to ride where his duties call him at the time?

A. He has to ride where his duties call him at the time.

Q. Where do brakemen or switchmen ride?

A. They are supposed to ride wherever their duties call them. If it calls them on the south end or north end or top, and if his duties call him to remain on the side it is his duty to remain there to protect the property and rolling stock of the Coast Line.

Q. Now, Mr. Tyner, as a railroad man are you or not familiar with the sway of railroad cars in motion?

A. Yes, sir.

Q. Now, assume a car moving at the rate of 20 or 25 miles an hour, what would you say the sway would be?

A. From ten to twenty inches the sway beginning about a little mid way the car.

Cross-examination:

Q. Where did you get word of Mr. Marshall's death?

A. From my sister over long distance over 362, I got a [fol. 53] phone call from my house.

Q. What time of day was that?

A. About 3.15 a. m. I had about 40 minutes to catch 85 and could not and came on 83.

Q. What time does 83 get in?

A. At that time I think around 12.25 in the daytime.

Q. Then you had to go out to the scene of th accident?

A. Yes, sir.

Q. How did you get out there?

A. I went out there with Mr. J. H. Lee.

Q. You went out there with Mr. Lee?

A. Yes, sir.

Q. Who else was out there?

A. There was no one but me and Mr. Lee.

Q. These semaphore boxes are made out of sheet iron?

A. Yes, sir, I think so.

Q. A great many of them have dents in them?

A. I guess so, I don't think they are dressed iron, I think they are regular rough castings, I don't think they have been run through a lathe. I guess they have dents in them.

Q. You got in here about 12.30, was the train on time?

A. Yes, sir.

Q. That was on the 6th of January.

A. Yes, sir.

Q. What time did you get out to the semaphore?

A. I guess about 1.30.

Q. Mr. Marshall's body had been removed before you got there?

A. Yes, sir.

Q. Mr. Lee had not been out there before?

A. I don't think he had, no.

Q. You and he were the only two who went out?

A. Yes, sir.

[fol. 54] Q. You say these box cars sway as they run?

A. Yes, sir.

Q. How much do they sway?

A. From ten to twenty inches. They have a greater sway at the top than the bottom.

Q. Mr. Kleckley is all wrong in his testimony?

Mr. Logan: I think the Supreme Court has held that you cannot ask one witness if another witness's testimony is incorrect.

Court: I will have to sustain the objection.

Q. The bottom does not move ten to twenty inches from side to side?

A. No, sir, those trucks are built on a bolster the shape of a chair rocker and they fit into a groove and a pin goes through and they rock like that, sway.

Q. There is a center plate on the bolster?

A. Yes, sir.

Q. And on the car that fits into?

A. Yes, sir.

Q. Made out of heavy metal?

A. Yes, sir.

A. They call them male and female parts?

A. Yes, sir.

Q. And in addition to that they have a side bearing?

A. Yes, sir.

Q. What is the clearance in those side bearings?

A. I would say two to three inches; they might be greater, I have never measured the distance.

Q. You work down here at the Charleston yard?

A. I run out of the Charleston yard, brakeing and flagging to Savannah.

Q. You pass over this pieec of track?

A. Yes, sir, I flagged from April the 9th to October the 10th then I was transferred.

[fol. 55] Q. What year was that you were doing that?

A. 1918.

Q. Those semaphores were located at that time just as they are now?

A. Yes, sir.

Q. In 1922 or 1923 they were there?

A. Yes, sir.

Q. All you railroad men are familiar with that sway of the box cars?

A. Yes, sir.

Q. Mr. Marshall, your brother in law, worked two years for the Coast Line at Florence before he come here?

A. I don't know how long he worked there I was on the main line, then, he worked some time, I don't know how long.

Q. He worked down here some time?

A. He worked here a while and was cut off and was called back.

Q. He worked also at Bennett Yard?

A. I don't know whether that was his regular job. He was an extra man; he was not a regular assigned man.

Q. All you railroad men know about the semaphores alongside of the track?

A. Yes, sir.

Q. You are familiar with the rules of the company?

A. Pretty well sir.

Q. You were familiar with them in 1923?

A. I guess I was.

Q. Was rule 706 in effect then: "Employees are required to inform themselves respecting the location of all structures or obstructions along the line which will not clear them when on the top or sides of cars."

A. Yes, sir.

Q. That was the rule of the Atlantic Coast Line R. R. [fol. 56] Co., the company for which you worked?

A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Logan: I offer in evidence the mortuary tables which show that Mr. Marshall had an expectancy of 37.43 years.

I also offer in evidence the seventh paragraph of the defendant's answer, which reads as follows:

"Seventh. Further answering said complaint, and for a further defense to said action, this defendant alleges that the injuries and death of the deceased were due to and caused by the negligence of the said deceased contributing to and combining and concurring with the alleged negligence of the defendant and constituting a proximate cause thereof, without which the same would not have happened, in the following particulars, to wit:

"(a) In not going directly to the roof of the freight car on which he was riding as instructed by the conductor of said train, but in remaining on the side of the car, contrary to said orders and instructions.

"(b) In not keeping a proper lookout for the signal devices and other obstructions which are ordinarily erected on the side of tracks of the defendant, near said tracks.

"(c) In failing and omitting to keep a proper lookout for the semaphore mentioned in the complaint herein, whose presence and location were well known to the deceased.

"(d) In leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore erected at a greater distance from the track than is required by the regulations of the South Carolina Railroad Commission, hereinbefore set forth."

Mr. Young: I object to that being offered in evidence. You can offer many defenses as you wish to and that is [fol. 57] a part of the defense of contributory negligence.

Court: I will let it go in evidence but I don't think it is really necessary.

The Plaintiff rests.

Mr. Young: If your honor please, I offer in evidence certified copies to two circulars of the South Carolina Railroad Commission:

"Circular No. 211, Amending Circular 209

Clearances

"Columbia, S. C., May 24th, 1916.

To all railroads operating in South Carolina:

"The Railroad Commission of South Carolina unanimously adopted the following resolution:

"Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals.

"Be it resolved that no building, or platform, or other obstruction be allowed erected or maintained nearer than four feet of the outer edge of the nearest rail of the main or side track of any railroad in the State of South Carolina.

"This limit of clearance shall not apply to bridges already constructed, or to passenger landings.

"Please be governed accordingly."

"Circular No. 216, Amending Circular No. 211

Clearances

"Columbia, S. C., October 11th, 1916.

To all railroads operating in South Carolina:

[fol. 58] "The Railroad Commission of South Carolina unanimously adopted the following resolution:

"Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals:

"Be it therefore resolved that no building, or platform, or other structure about station grounds be allowed erected or maintained nearer than four feet from the outside edge of the main or side track rail of any railroad in the state of South Carolina, measurements being made at rail top level; and furthermore, that no obstruction be allowed erected or maintained at any point other than station grounds nearer than four feet from the outer edge of the main or side track rail of any railroad in the State of South Carolina, measurement being made four feet above the top of rail.

"This limit of clearance shall not apply to bridges already constructed, or to passenger station landings.

"Please be governed accordingly."

In Court of Common Pleas of Charleston County

Motion for Directed Verdict

Mr. Young: I now ask your honor to direct a verdict for the defendant on the ground that the plaintiff has failed to prove any actionable negligence on the part of the defendant in this case.

Second. That if your honor should hold that they have proved any negligence, then the deceased came to his death as a result of one of the risks assumed in his employment, to wit: the risk of striking the semaphore described in the testimony whose presence and location was well known to

the deceased and the alleged danger and risk of which he [fol. 59] saw or by the exercise of ordinary care could have seen and appreciated at the time of the accident, and,

Third. There is no evidence in this case at all as to how the deceased came to his death or as to the proximate cause thereof.

Court: I will have to submit it to the jury, Mr. Young. I have some doubt about it in my mind, the evidence in this case is not exactly like it was in the last case.

In Court of Common Pleas of Charleston County

Charge to Jury

Now, gentlemen of the jury, I will try to submit this case to you under the law as I think it is, and, of course, the jury will take the law as I give it to them and if I make any mistake in stating the issues I wish counsel would correct me. Now, gentlemen of the jury, the plaintiff in this case who is the administrator of the estate of George A. Marshall, brings this suit against the Atlantic Coast Line Railroad Company and he alleges that George A. Marshall died on the 6th day of January, 1923 and left no will and at the time he was married and at the time of his death he was married and left surviving him his heirs and distributees Sallie Marshall and three children, whose names are set forth in the complaint. That on the day he was killed, the 6th day of January, 1923, and for some time before this he was employed by the defendant railroad company in the capacity of switchman and that while in the employment of the defendant railroad company and engaged in the duties incident to and growing out of the employment in running [fol. 60] and operating one of the defendant's trains engaged in interstate commerce he met with an accident and was so badly injured that he died on that day and this action is brought under the provisions of the Federal Employers' Liability Act. They state further that he was engaged in his duties as switchman on an engine and train of cars of the defendant R. R. Company moving over the defendant's main line at or near the city of Charleston in

the direction of this city; that it was dark and foggy and about three o'clock in the morning; that while proceeding as aforesaid at or about Five Mile crossing, near said city the engine and train of cars were caused to be stopped by reason of trouble with the brakes of some of said cars or other cause, and that the said George A. Marshall in the course of his duty and employment got down on the ground to examine into and correct said trouble; that at or near the point where said engine and train of cars had stopped as aforesaid, defendant herein, Atlantic Coast Line Railroad Company, its agents and servants, in violation of its duty to furnish for the use of the said George A. Marshall a reasonably safe roadbed and track free from obstructions which might be placed on the side of the track, and to place and maintain signal devices at a reasonably safe distance from the track so as not to extend over towards the track in such close proximity as to endanger the lives of its employees who might be running or operating its trains by said signal devices, had placed and maintained a signal device or obstruction too close to the track, and in such close proximity to the track as to leave an insufficient space intervening between it and the side of the train, and so close as to interfere with the proper operation of defendant's trains and the proper performance of their duties by its employees thereabout, so that upon said train proceeding forward, and [fol. 61] while the said George A. Marshall was mounting the ladder of one of the cars attached or while he was examining the defective car as aforesaid, the defects in which were due to the negligence of the defendant herein, thereby necessitating that said decedent examine the same, and that while thus engaged in the duties incident to his employment, he was struck by said signal device or obstruction and thrown from his train and so badly injured as to cause his death thereafter.

So boiled down and put in a few words that means that while Marshall was performing his duties as switchman and was up on the side of one of these cars they passed along by this semaphore, or signal device and he was struck in the head and killed, and the plaintiff claims that the defendant was negligent in placing the semaphore or signal device too close to the track. Now they set out and specify the particular negligence upon which they rely in this case

in several specifications which I will read to you and I want you to listen to them very closely because the burden is on the plaintiff to make out his case by the greater weight of the evidence and if he does not your verdict must be for the defendant, and if he recovers at all he has got to recover on one or more of these specifications of negligence and no other, because upon these specifications of negligence he bases his case and if he does not make out one or more then he has made out no case. He must make out not only that the defendant was negligent in the particulars complained of but that such negligence was the proximate cause of the death of this man. Now what are those specifications of negligence and in what particulars is the plaintiff charging the defendant here with negligence.

(a) In failing and omitting to furnish the said decedent [fol. 62] a reasonably safe place to work.

(b) In failing and omitting to furnish a reasonably safe readbed and track free from obstructions.

(c) In failing and omitting to place and maintain said signal device at a reasonably safe distance from the track.

(d) In causing and allowing said signal device or obstructions to be placed and maintained too close to the track.

(e) In causing and allowing said signal device or obstruction to be placed and maintained in such close proximity to the track as to leave insufficient space between it and the side of a train within which employees might safely perform the duties incident to their employment and the proper operating of defendant's trains.

(f) In causing and allowing said signal device or obstructions to be at the point, place and position the same was maintained.

(g) In failing and omitting to notify or warn said decedent of the close proximity of said signal device or obstructions to the side of the train.

(h) In causing and allowing a defective and bad order box car to be attached to and form a part of the train and to be transported by the engine to which decedent was attached.

Court: There is no evidence as to specification (h) and that goes out of the case.

(i) In causing and allowing said engine and train of cars to be run at a high and dangerous and excessive rate of speed within the yard limits and block system of de- [fol. 63] fendant and in violation of its rules and regulations governing the same. Now those are the specifications of negligence and remember that so far as the specification of negligence as to the bad order or defective box car is concerned it is admitted that there is no evidence about that and that goes out.

Now they allege that at the time of the death of George A. Marshall he was a married man and left surviving him his widow Sally T. Marshall and the three minor children named, all of whom were dependent upon said decedent for their support and maintenance; that decedent at the time of the happening of said accident was earning one hundred and eighty dollars per month, was a young man of 25 years, strong healthy and able-bodied, was kind and affectionate to his wife and children, and by reason of the negligent killing of said decedent his wife and children have been injured in the sum of fifty thousand dollars and they ask a verdict at your hands for fifty thousand dollars damages.

Now, the defendant comes into court and answers that and admits the allegations of the first, third and fourth paragraphs of the complaints, that is that Marshall died on the date they allege and that he left his wife and children and the third is that the railroad company was a railroad organization under the laws of the State of Virginia doing business in the County of Charleston and was engaged in interstate commerce, and that Marshall while in the employment of the corporation and engaged in his duties as switchman met with an accident and was killed. Now, those paragraphs of the complaint are admitted and it is also admitted that this action is brought under and in pursuance of the Federal Employers Liability Act, and going further in their second defense they deny each and [fol. 64] every other allegation of the complaint not specifically admitted or denied and go further with specific reference to subdivisions A, B, C and D in paragraph six of the complaint which are the specifications of negligence

and the other allegations in the complaint referring to the semaphore they say that on or about the 14th day of Ma[illegible] 1916 the Railroad Commission of South Carolina issued a circular covering this question of the distance they were to place semaphores from the railroad track, circular 211 amending circular 208. (Reads same). Then the Railroad Commission of South Carolina issued circular 216 with regard to clearance, (reads same), and a copy of this was served on the defendant, and they say they complied with that. In other words they allege in the fourth paragraph of the answer that they put the semaphore even further than was required by the railroad commission under these circulars which I have read to you, and the defendant claims and sets up that the death of Marshall was due to and caused by one of the risks of his employment assumed in working for the defendant, that is to say, now there is interlined here "on information and belief", they say the risk of riding on a freight car and passing various obstructions such as signal devices, semaphores and the like whose presence they allege were known to him and the danger of which were obvious and so assumed by him, and in the 6th paragraph on information and belief they allege that the death of Marshall was due to and caused by one of the risks of the employment assumed in working for the defendant, that is to say, the risk of the work of a switchman working about cars, with defects arising in the ordinary operation of the cars the occurring of such defects in such operation being reasonably in the contemplation of the parties when the deceased undertook to work for the de-
[fol. 65] fendant, and said defects in this case being obvious and actually known to the deceased and ordinarily incident to his employment. Now the seventh paragraph of the answer which sets up contributory negligence goes out as there is no evidence on that.

Now, Mr. foreman, and gentlemen of the jury, I will give you the law as best I can, some times I make mistakes and if I do the case is sent back as in the Youngblood case where Judge Cothran said it was like rolling an empty barrel, but I shall give you the law as best I can and when I have done that I have done all that I can do and my conscience is clear. Now this is a action based on negligence and I want to say to you gentlemen (addressing

counsel in the case) that there are allegations of wilfulness and wantonness in here and in the State Court a man damaged by wilfulness and wantonness can recover the same as if he was damaged by negligence, of course there is no such thing as punitive damages in this case. Now, Mr. Logan, do you want me to submit to this jury the question of wilfulness and wantonness?

Mr. Logan: I don't think you can recover under the Employers Liability Act for wilfulness and wantonness. I don't think you can recover any damages for that. I think the damages are limited to the pecuniary loss suffered by the widow and children.

Court: In the state court you can recover actual and punitive damages but under the Employers Liability Act you cannot recover any punitive damages but in the state court you can recover actual damages which may happen from wilfulness or wantonness or from negligence. Now how is it under the Employers Liability Act?

Mr. Logan: I think you could recover actual damages for [fol. 66] any act of the defendant whether they be negligent or wanton or wilful, and if there is any testimony of wilfulness or wantonness the damages could not be increased over the pecuniary loss. I think as to increasing the damages that would have to be withdrawn. What they have to pass on is what your honor will charge them on the measure of damages under the Federal law. I would prefer that your honor charge them only on negligence and not wilfulness and wantonness.

Mr. Young: As I understand the rule under the Federal Employers Liability Act they can only recover for pecuniary loss, not for sorrow and grief, just the cold, hard money they lost.

Court: There is no doubt about that. So, Mr. foreman and gentlemen of the jury, the question of wilfulness and wantonness alleged in the complaint goes out and you will now try this case on the allegations of negligence in the complaint, and right at the beginning I want to say to you that what was done in the other case has nothing to do with this case. You and I are trying this case just as if it was coming into court for the first time and we must do it that way. What is the case that has been made before us as presented by the plaintiff? That is what we

must act on and nothing else? What is meant by negligence? Ordinarly we would say it is carelessness, but there are legal definitions of it. One is that it is the want of ordinary care. It is the doing of something that a man of ordinary caution and prudence would not have done, or it is failing to do something which a man of ordinary caution and prudence would have done and it all depends on the circumstances surrounding the case at the time the act is done or at the time the person failed to do the act. Now that is clear enough when we come to [fol. 67] think about it. If a man has a race track of his own, he can get out and speed his car at 80 miles an hour if he wants to, or a hundred if it will go that fast and if nobody is near or in his way it would not be an act of negligence so far as other people are concerned. It might be very reckless, but if he speeded it down one of these crowded streets that would be an entirely different proposition because the circumstances are different. In this case the plaintiff has based his case upon the charge of negligence against the defendant company. I have read to you the specification of negligence and it does not make any difference to you or to me how negligent the Atlantic Coast Line R. R. Company may have been if such negligence was not a proximate cause of the death of Mr. Marshall. The plaintiff alleges that that negligence not only existed but that it was a proximate cause of his death. Now when we come to proximate cause you want to know something about that and it is pretty hard to define. It has been defined to be that which was directly and immediately effective in producing the injury complained of, and without which it would not have occurred. In this case applied to the death of Mr. Marshall, that which was directly and immediately effective in producing the death of Mr. Marshall, and without which his death would not have occurred.

It is the duty of the master, Mr. foreman and gentlemen of the jury to furnish the servant a reasonably safe place to work and I want to make that plain. Now I am not going to make the mistake attributed to me in the Youngblood case, which I don't think I made. I think there was some mistake about that. I don't mean an absolutely safe place in which to work but a reasonably safe place. It has been put in this way by some of the courts, that the mas-

[fol. 68] ter must use reasonable care in order to provide a safe place in which the servant has to work. Now that does not mean that he has got to have an absolutely safe place. It is common knowledge that there are some kinds of work in which men engage that is dangerous in itself. There are more or less dangers attached to the work and when we say a reasonably safe place. We have got to take into consideration the kind of work the man is called on to do. I think I may say that there is more or less danger connected with railroading and when we say a reasonably safe place we have got to take into consideration the kind of work that the man is required to do and it is not required of the master to make everything absolutely safe for the railroad employees who are to run that train, but only that they shall make it as reasonably safe, having regard for the nature of the work the employees have to do. There is also a duty that devolves on the servant to use reasonable care that he shall not be injured while in the performance of his duties and master and servant mean almost identically the same thing as employer and employee. When the servant takes employment under a master he assumes all those risks which are necessarily incident to the work about which he is engaged; for instance there may be a building going up in this town eight or ten stories high; now everybody knows that walking about up that high on narrow planks there is more or less danger attached to it but the carpenter can't do his work without a certain amount of danger attached to it and the law says when he takes employment under his master he has that in mind and he assumes all of those dangers which are necessarily incident to his work and if he is injured by one of those dangers which he assumes and not through any negligence of the master the law says you will have to suffer your own injuries and [fol. 69] you can't recover any damages against the master because that was your contract either express or implied to assume those risks and if you get hurt it is your lookout and the same way with operating these trains. When a man is in the employ of a railroad company he assumes those risks which are necessarily incident to his employment, and if he is injured by one of those risks he can't recover. Now, Mr. foreman and gentlemen, I have already said to you that the plaintiff in this case must make

out his case by the preponderance or greater weight of the evidence and if he does not do that then your verdict must be for the defendant. The defendant has asked me to charge you some propositions of law. I think I have covered most of them but I will read them over.

1. I charge you that the jury cannot consider the allegations of defendant's answer in regard to contributory negligence as evidence against it, and that the statements in paragraph 7 cannot be considered as evidence in this case.

Court: Now that brings up that same question again, I think, and I charge you that the statements of fact set out in paragraph 7 you may consider. As to any admissions whatsoever of negligence against the Atlantic Coast Line R. R. Co. you can't consider. It is only those statements of fact set out in paragraph 7 which facts they allege constitute contributory negligence. As I say, contributory negligence goes out of the case, but the facts set out there and upon which they sought to base their charge of contributory negligence you may consider. The rest of it you can't consider at all.

2. I charge you that the burden is upon the plaintiff to prove by the greater weight or preponderance of the evi-[fol. 70] dence that the defendant was negligent, or wilful, or careless, or wanton in the particulars alleged by him, and if the plaintiff fails to prove by the greater weight of the evidence that the defendant was negligent or wilful in the particulars charged by him in his complaint, then you must bring in a verdict for the defendant.

Court: The question of wilfulness goes out of the case and the question of wantonness goes out of the case under the statement of the plaintiff's attorneys and anything along the line of wilfulness or wantonness is not to be considered in the case.

3. I charge you that it has been proved and is undisputed in this case that the South Carolina Railroad Commission, by a resolution dated October 11th, 1916, and effective at the time of this accident, has prescribed the minimum of the clearance for the erection of obstructions along the sides of the railroad tracks in this state, and it appearing from the evidence of both the plaintiff, and the defendant,

that the defendant, Atlantic Coast Line Railroad Company has complied with this resolution of the Railroad Commission, I charge you that there is no negligence shown on the part of the Railroad Company in this case in the location of the signal post or semaphore in question, and if you find no other negligence in the case, you must find for the defendant.

Court: I refuse to charge you that.

4. I charge you that when one enters the employment of another in an occupation which is in itself a hazardous or dangerous one, by so entering this employment he assumes all of those usual and ordinary risks and hazards of his employment, and if he is injured by any one of those hazards or risks, he cannot recover against his employer [fol. 71] for the injury.

Court: That is correct and I so charge you.

5. I charge you that where one is in the employment of a railroad company and is injured by some permanent appliance or apparatus of the railroad company even if the jury believe that the railroad company may have been negligent in placing the semaphore mentioned in the complaint, the plaintiff cannot recover for the death of intestate if you further find by the preponderance of evidence that the location of the semaphore and risk of injury therefrom were obvious to intestate, or were known to and appreciated by him.

Court: I charge you that.

6. I charge you that if the injuries and death of the plaintiff's intestate, the deceased, were not due to any negligence or wilfulness (I strike out wilfulness) on the part of the railroad company, but were solely due to and caused by the negligence or carelessness of the deceased, then I charge you that the plaintiff in this action is not entitled to a verdict, and you must find a verdict for the defendant.

Court: I charge you that.

7. I charge you that under the Federal Employers' Liability Act the measure of damages recoverable are limited to such loss as results because the dependent relatives have

been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss sustained and is always the present cash value of the future benefits of which the beneficiaries were deprived by the death, making adequate allowance according to the circumstances, for [fol. 72] the earning power of money. The excess of the deceased over the amount reasonably to be expected to be contributed to the beneficiaries, cannot be reduced to a cash value and assessed as an element of damage.

If you should find a verdict for the plaintiff in this case, the verdict should be computed strictly in accordance with these instructions, and the plaintiff is only entitled to a verdict for the present cash value of what the deceased might reasonably have been expected to give to his wife and children, had he lived.

Court: I charge you that.

8. I charge you that this case is under the Federal Employers' Liability Act and that that act permits recovery upon the basis of negligence only. The defendant is not liable because of any defect of insufficiency in plat or equipment that is not attributable to negligence. The burden is on the plaintiff to show by reasonable evidence a breach of duty owed him by defendant in respect of the place where his intestate was killed and that in whole or in part his injuries resulted proximately therefrom, and that in this case the deceased, Mr. Marshall, assumed the ordinary risks of his employment and also extraordinary risks and those due to the negligence of his employer and fellow employees when obvious and fully known and appreciated.

Court: I charge you that.

Now, gentlemen, I believe that covers the law of the case.

Mr. Logan: I think in coming to their conclusions as to the pecuniary loss they have a right to take into consideration the mortuary tables which were put in evidence [fol. 73] which shows that Mr. Marshall had an expectancy of 27 or 28 years.

Court: Yes, they can take the tables to their room if they wish to.

Now, Mr. foreman whatever your verdict may be write it on the complaint, you can write it here in the complaint in the middle. And your verdict will be either we find for the plaintiff so many dollars, writing it out in words and not in figures, or we find for the defendant, and sign your name as foreman. I will give you the complaint and answer and if you wish you may take the mortuary tables with you.

IN COURT OF COMMON PLEAS OF CHARLESTON COUNTY

DEFENDANT'S EXCEPTIONS

1. The defendant excepts that his honor the presiding judge erred in admitting into evidence, over the objection of the defendant, the seventh paragraph of the defendant's answer, as follows:

"Seventh. Further answering said complaint, and for a further defense to said action, this defendant alleges that the injuries and death of the deceased were due to and caused by the negligence of the said deceased contributing to and combining and concurring with the alleged negligence of the defendant and constituting a proximate cause thereof, without which the same would not have happened, in the following particulars, to wit:

"(a) In not going directly to the roof of the freight car on which he was riding as instructed by the conductor of [fol. 74] said train, but in remaining on the side of the car, contrary to said orders and instructions.

"(b) In not keeping a proper lookout for the signal devices and other obstructions which are ordinarily erected on the side of tracks of the defendant, near said tracks.

"(c) In failing and omitting to keep a proper lookout for the semaphore mentioned in the complaint herein, whose presence and location were well known to the deceased.

"(d) In leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore erected at a greater distance from the track than is required by the regulations of the South Carolina Railroad Commission, hereinbefore set forth."

It being respectfully submitted that the facts alleged in the defendant's answer in the affirmative defense, to wit, contributory negligence, could not be used as evidence against it especially in this case where his honor charged the jury that there was no element of contributory negligence in the case.

2. That his honor erred in refusing to charge the defendant's first request to charge, as follows:

"I charge you that the jury cannot consider the allegations of defendant's answer in regard to contributory negligence as evidence against it and that the statements in paragraph seven cannot be considered as evidence in this case."

[fol. 75] and instead charging as follows:

"Now that brings up the same question again, I think, and I charge you that the statements of fact set out in paragraph seven you may consider. As to any admission whatsoever of negligence against the Atlantic Coast Line Railroad Company, you can't consider. It is only those statements of fact set out in paragraph seven which facts they allege constitute contributory negligence. As I say, contributory negligence goes out of the case, but the facts set out there and upon which they sought to base their charge of contributory negligence you may consider. The rest of it you can't consider at all."

It being respectfully submitted that the statements made in the affirmative defense of contributory negligence cannot be used as evidence against the defendant and further that if the jury were to consider the facts as pleaded in said paragraph they were also bound to take into consideration the fact alleged that plaintiff's intestate was negligent as therein set out.

3. That his honor erred in refusing to direct a verdict for the defendant on the ground that the plaintiff failed to prove any actionable negligence on the part of the defendant in this case, it being respectfully submitted that there is nowhere in the testimony any proof of negligence on the part of defendant.

4. That his honor erred in refusing to direct a verdict for the defendant upon the ground urged that the deceased

came to his death as the result of one of the risks assumed in his employment, to wit, the risk of striking the semaphore described in the testimony, the presence and location of which was well known to the deceased, and the alleged dan-
[fol. 76] ger and risk of which he saw, or by the exercise of ordinary care could have seen, and appreciated at the time of the accident, it being respectfully submitted that if the deceased was killed by striking a semaphore on the side of the track, that it was a risk he assumed when he accepted the employment as a switchman and a risk that was plain and obvious and which he could have seen and appreciated by the exercise of ordinary care.

5. That his honor erred in refusing to direct a verdict for the defendant because there is no evidence in this case at all as to how the deceased came to his death or as to the proximate cause thereof, it being respectfully submitted that there is no evidence showing how the deceased came to his death and it cannot be left to the jury to conjecture to a proximate cause of the death, but that the plaintiff is required to prove by the greater weight of the evidence how the deceased came to his death and the proximate cause thereof and to prove negligence on the part of the defendant.

STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

J. L. POWE, as Administrator of George A. Marshall, Deceased, Respondent,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

PETITION

To the Honorable Thomas P. Cothran, Associate Justice of the Supreme Court of South Carolina:

The petition of the Atlantic Coast Line Railroad Company, respectfully shows:

1. That the final judgment of the Supreme Court in South Carolina in the above stated cause against your petitioner was rendered on 19th September, 1930, by an opinion affirming the judgment of the Court below.

2. That the said final judgment is subject to review by the Supreme Court of the United States on Writ of Certiorari, upon the grounds that the said final judgment denies to your petitioner rights, privileges and immunities granted to it under the constitution and laws of the United States.

3. Your petitioner further presents that the cause of action herein arises solely under the Act of Congress and Acts amendatory thereto commonly known as the Federal Employers' Liability Act, under which all questions of liability are finally determinable only by the Supreme Court of the United States, which has ultimate jurisdiction of questions of law and fact arising in such case.

4. That your petitioner, being the party aggrieved by the aforesaid judgment, desires to apply for a Writ of Certiorari from the Supreme Court of the United States, and in order to make such application and obtain such Writ it is necessary that the execution and enforcement of such judgment be stayed for a reasonable time.

5. That your petitioner stand- ready to give such security for the protection of the plaintiff in the above stated cause as may be necessary or proper.

Wherefore your petitioner prays that the execution and enforcement of the aforesaid judgment be stayed pursuant to the Acts of Congress in such case made and provided, and that your petitioner be allotted a period of ninety days in which to apply for a Writ of Certiorari from the Supreme Court of the United States.

Thomas W. Davis, Hagood, Rivers & Young, Attorneys for Atlantic Coast Line Railroad Company.

STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

J. L. POWE, as Administrator of George A. Marshall, Deceased, Respondent,

VS.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

ORDER

The defendant, Atlantic Coast Line Railroad Company, having made application for stay of execution and enforcement of judgment in the above entitled cause for a reasonable time to enable it to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States, it is

Ordered that the said defendant have ninety days from the date of said judgment within which to apply for a Writ of Certiorari from the Supreme Court of the United States and that the remittitur and execution and enforcement of judgment herein be stayed until final disposition of said petition for certiorari and until further order of this Court, provided the defendant shall file a bond with good and sufficient surety in the penal sum of one thousand dollars within ten days from the date hereof, conditioned to indemnify the plaintiff above named against all damages and costs

that he may sustain by reason of the stay if the defendant fail to make application for such Writ within the period allotted therefor, or fails to obtain an order granting its application, or fail to make good its plea in the Supreme Court of the United States.

It is further ordered that a copy of this order be served without delay on the plaintiff herein or one of his attorneys of record.

It is further ordered that this order be filed in the office of the Clerk of the Supreme Court of South Carolina.

T. P. Cothran, Associate Justice of the Supreme Court of South Carolina.

September 25, 1930.

THE STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

J. L. POWE, as Administrator of George A. Marshall, Deceased, Respondent,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

BOND

Know all men by these presents that we, Atlantic Coast Line Railroad Company, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto J. L. Powe, Administrator of the estate of George A. Marshall, deceased, his heirs, executors, administrators, successors and assigns, in the penal sum of One Thousand ($1,000.00) Dollars, for the payment of which well and truly to be made, we and each of us bind ourselves and our successors, jointly and severally by these presents.

Sealed with our seals and dated this 30th day of September, 1930.

Conditioned, nevertheless, that whereas Atlantic Coast Line Railroad Company has applied to the Honorable Thomas P. Cothran, Associate Justice of the Supreme Court of South Carolina, for a stay of execution and enforcement of the final judgment rendered by the Supreme

Court of the State of South Carolina in favor of J. L. Powe, as Administrator of the estate of George A. Marshall, deceased, against Atlantic Coast Line Railroad Company, on to-wit, the 19th day of September, 1930, to enable the said defendant to apply for and obtain a writ of certiorari from the Supreme Court of the United States to review said judgment.

Now, therefore, if the defendant, Atlantic Coast Line Railroad Company, above named, shall answer for all damages and costs which the plaintiff above named may sustain by reason of the stay of the said judgment against said defendant, if the said defendant fail to make application for such writ within the period of Ninety (90) days from the date of said judgment, the same being the period allotted therefor, or fail to obtain an order granting its application, or fail to make good its plea in the Supreme Court of the United States, then this obligation to be void; otherwise to be and remain in full force and effect.

Atlantic Coast Line Railroad Company, by R. D. Cromly, Attorney in Fact. (Seal.) Fidelity and Deposit Company of Maryland, by J. Addison Ingle, Attorney-in-Fact. (Seal.)

Signed, sealed and delivered in the presence of W. M. Peck, V. E. Phelps, as to Atlantic Coast Line Railroad Company; John DuRant. Ashmore, Byrdee Armstrong, as to Fidelity and Deposit Company of Maryland.

Approved.

T. P. Cothran, Associate Justice of Supreme Court of South Carolina.

Oct. 4, 1930.

THE STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

Case No. 806. Opinion No. 12975

J. L. POWE, ADMR., Respondent,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

Appeal from Charleston County

Hayne F. Rice, Judge

Filed Sept. 19, 1930

Affirmed

Hagood, Rivers and Young, of Charleston, for appellant.

Logan & Grace and Lionel K. Legge, all of Charleston, for respondent.

C. T. GRAYDON, A. A. J.:

This action was commenced in the Court of Common Pleas for Charleston County on the 30th day of May, 1924. The action was originally in the name of C. M. Tyner as Administrator of the Estate of George A. Marshall, as Plaintiff, against the defendant Atlantic Coast Line Railroad Company. The case has been twice tried and after the first trial C. M. Tyner died and by an order dated 19th of September, 1929, J. L. Powe was appointed administrator of the Estate of George A. Marshall and as such administrator was substituted as plaintiff.

The action was one admittedly under the Federal Employers Liability Act and the amendments thereto.

The case was first tried on October 10, 1925 and resulted in a verdict in favor of the plaintiff for the sum of Twenty-Eight Thousand Eight Hundred ($28,800.00) Dollars. An appeal was taken to the South Carolina Supreme Court which affirmed the decision of the lower Court.

Tyner, Administrator, v. A. C. L. R. Co., 149 S. C. 89; The defendant carried the case on a Writ of Certiorari to

the United States Supreme Court and the same was reversed and remanded for a new trial.

A. C. L. R. Co., v. Tyner, 278 U. S. 565, 73 Law. Ed., 508: The case was again tried at Charleston in October, 1929, before Judge Rice and a jury and resulted in a verdict in favor of the plaintiff for the sum of Thirty Thousand ($30,000.00) Dollars.

A full statement of the pleadings and facts developed on the first trial of the case can be found in Tyner, Administrator, against A. C. L. R. Co., *Supra,* and only a brief statement will here be made with such facts as were developed on the second trial of the cause which were not developed on the first trial. George A. Marshall was employed as a switchman by the defendant railroad company and on January 6, 1923, was killed while in such employment. He left surviving him a widow and three small children for whose benefit the action was brought under the Federal Employers Liability Act (45 U. S. C. A., paragraph 5159).

The first two paragraphs of the complaint cover the formal allegations as to the appointment of the administrator and for the benefit of whom the action was brought. The third paragraph of the complaint alleges the incorporation of the defendant; that at the time the defendant was engaged in interstate commerce and that the said George A. Marshall, while employed by said railroad corporation and while engaged in the duties incident to and growing out of his employment, met with an accident on or about the 5th. day of January, 1923 and was so badly injured as to cause his death. The fourth allegation of the complaint alleges that the action was brought under the provision of the Federal Employers Liability Act. The fifth and sixth allegations of the complaint were as follows:

"Fifth. On information and belief, that on said 6th. day of January, 1923, said deceased, George A. Marshall, was engaged in the performance of his duties as a switchman attached to an engine and train of cars moving over defendant's main line of tracks at or near the city of Charleston, state aforesaid, and in the direction of said city; that it was dark and foggy, the time being about three o'clock in the morning; that while proceeding as aforesaid at or about Five Mile Crossing, near said city the said engine

and train of cars were caused to be stopped by reason of trouble with the brakes on some of said cars, and that the said George A. Marshall in the course of his duty and employment got down to the ground to examine into and correct said trouble; that at or near the point where said engine and train of cars had stopped as aforesaid, defendant herein, Atlantic Coast Line Railroad Company, its agents and servants, in violation of its duty to furnish for the use of the said George A. Marshall a reasonably safe roadbed and track free from obstructions which might be placed on the side of the track, and to place and maintain signal devices at a reasonably safe distance from the track, so as not to extend over towards the track in such close proximity as to endanger the lives of its employees who might be running or operating its trains by said signal devices, had placed and maintained a signal device or obstruction too close to the track, and in such close proximity to the track as to leave an insufficient space intervening between it and the side of the train, and so close as to interfere with the proper operation of defendant's trains and the proper performance of their duties by its employees thereabout, so that upon said train proceeding forward, and while the said George A. Marshall was mounting the ladder of one of the cars attached or while he was examining the defective car as aforesaid, the defects in which were due to the negligence of the defendant herein, thereby necessitating that said decedent examine the same, and while thus engaged in the duties incident to his employment, he was struck by said signal device or obstruction and thrown from his train and so badly injured as to cause his death soon thereafter.

"Sixth. That the injuries and death of the said George A. Marshall were caused by the negligence, carelessness, recklessness, wilfulness and wantonness of said defendant, Atlantic Coast Line Railroad Company, its agents and servants, as aforesaid, and in the following particulars, to-wit:

"(a) In failing and omitting to furnish the said decedent a reasonably safe place to work.

"(b) In failing and omitting to furnish a reasonably safe roadbed and track free from obstructions.

"(c) In failing and omitting to place and maintain said signal device at a reasonably safe distance from the track.

"(d) In causing and allowing said signal device or obstructions to be placed and maintained too close to the track.

"(e) In causing and allowing said signal device or obstructions to be placed and maintained in such close proximity to the track as to leave insufficient space between it and the side of a train within which employees might safely perform the duties incident to their employment, and the proper operating of defendant's trains.

"(f) In causing and allowing said signal device or obstruction to be at the point, place and position the same was maintained.

"(g) In failing and omitting to notify or warn said decedent of the close proximity of said signal device or obstructions to the side of the train.

"(h) In causing and allowing a defective and bad order box car to be attached to and form a part of the train and to be transported by the engine to which decedent was attached.

"'(i) In causing and allowing said engine and train of cars to be run at a high and dangerous and excessive rate of speed within the yard limits and block system of defendant and in violation of its rules and regulations governing the same."

The seventh allegation was that George A. Marshall left him surviving his wife and three minor children who depended upon him for support and maintenance; that he was earning One Hundred and Eighty ($180.00) Dollars per month and was a young man of twenty-five (25) years, strong, healthy, and ablebodied, and that his death resulted in great pecuniary loss to said wife and children.

The eighth paragraph demands judgment in the sum of Fifty Thousand ($50,000.00) Dollars.

As the answer of the defendant is involved in the consideration of the exceptions made by the defendant, it is here given in full.

First. It admits the allegations of the first, third and fourth paragraphs, and so much of the second paragraph as alleges that the said decedent, George A. Marshall, on the 6th. day of January, 1923, and for some time prior thereto, was employed by the defendant railroad company in the capacity of switchman.

"Second. It denies each and every other allegation in said complaint not hereinabove or hereinafter specifically admitted.

"Third. Further answering said complaint and with specific reference to the subdivisions a, b, c, d, e, f, and g in paragraph sixth of the complaint, and the other allegations in the complaint referring to the semaphore hereinafter mentioned, the defendant alleges that heretofore, to-wit, on or about the 24th. day of May, 1916, the Railroad Commission of South Carolina in Circular No. 211, amending Circular No. 208 with regard to clearance, unanimously adopted the following resolution:

" 'Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals;

" 'Be it resolved that no building, or platform, or other obstruction be allowed erected or maintained nearer than four feet of the outer edge of the nearest rail of the main or side track of any railroad in the State of South Carolina. This limit of clearance shall not apply to bridges already constructed, or to passenger station landings.'

" 'A copy of which was served upon the defendant by said Railroad Commission; also, that on or about October 11th, 1916, the Railroad Commission of South Carolina in Circular No. 216 with regard to clearances adopted the following resolution:

" 'Taking into consideration not only the safety of the general public and employees of the railroad, but for the further consideration that it is absolutely necessary for all railroad employees to give and receive signals;

" 'Be it resolved that no building, or platform, or other structure about station grounds be allowed erected or maintained nearer than four feet from the outside edge of the

main or side track of any railroad in the State of South Carolina, measurement being made at rail top level; and furthermore, that no obstruction be allowed erected or maintained at any point other than station grounds nearer than four feet from the outer edge of the main or side track rail of any railroad in the State of South Carolina, measurement being made four feet about the top of the rail.

" 'This limit of clearances shall not apply to bridges already constructed, or to passenger landings.'

"A copy of which was also served upon this defendant by the said Railroad Commission.

"Fourth. That this defendant complied with the terms of the said resolution in the erection of the semaphore mentioned in the complaint, the same being at a greater distance than four feet from the outer edge of the nearest rail of the track at the point as so required.

"Fifth. Further answering said complaint and for a further defense to the said action, on information and belief the defendant alleges that the injuries and death of the said George A. Marshall was due to and caused by one of the risks of his employment assumed in working for the defendant, that is to say, the risk of riding on the side of a freight car and of passing various obstructions such as signal devices, semaphores and the like, whose presence was known to him and the dangers of which were obvious and so assumed by him.

"Sixth. Subject to defendant's motion to strike out certain allegations of the complaint with reference to defects in certain of the freight cars on the said train mentioned in said complaint, and subject further to its motion to make said allegations more definite and certain, in various particulars, and saving and reserving all its rights under said motions, and further answering said complaint and for a further defense to said action, on information and belief, the defendant alleges that the injuries and death of the said George A. Marshall were due to and caused by one of the risks of his employment, assumed in working for the defendant, that is to say, the risk of the work of a switchman about cars, with defects arising in the ordinary operation of the cars, the occurring of such defects in such operation

being reasonably in the contemplation of the parties when the deceased undertook to work for the defendant, and said defects in this case being obvious and actually known to the deceased and ordinarily incident to his employment.

"Seventh. Further answering said complaint, and for a further defense to said action, this defendant alleges that the injuries and death of the deceased were due to and caused by the negligence of the said deceased contributing and combining and concurring with the alleged negligence of the defendant and constituting a proximate cause thereof, without which the same would not have happened, in the following particulars, to-wit:

"(a) In not going directly to the roof of the freight car on which he was riding as instructed by the conductors of said train, but in remaining on the side of the car, contrary to said orders and instructions.

"(b) In not keeping a proper lookout for the signal devices and other obstructions which are ordinarily erected on the side of tracks of the defendant, near said tracks.

"(c) In failing and omitting to keep a proper lookout for the semaphore mentioned in the complaint herein, whose presence and location were well known to the deceased.

"(d) In leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore erected at a greater distance from the track than is required by the regulations of the South Carolina Railroad Commission, hereinbefore set forth."

The plaintiff offered two pieces of evidence which were not given at the former trial which were vital to the plaintiff's case. The first was the testimony on the part of the witness C. C. Tyner, a brother-in-law of the deceased, who was in the employ of the A. C. L. Railroad and for that reason did not care to testify in the trial, who testified in substance that he knew the location of semaphore 3911; that on the morning of the 6th of January, 1923, he went to semaphore 3911 and examined the semaphore casing and surrounding conditions; that he found about four feet from the base of the semaphore something had apparently wiped the smoke and the soot from the semaphore and about six

(6) or seven (7) inches further there were apparently blood stains on the north side of the semaphore casing; that he examined the body of Marshall and found a pad on the back of the head and two blood clots on each side of the pad and the head was crushed in and soft; that switchmen and brakemen are supposed to rider wherever their duties call them on the train; that a car moving at the rate of twenty (20) or twenty-five (25) miles an hour would have from ten (10) to twenty (20) inches sway in it; that he arrived at the scene of the accident about noon or a little after noon on the 6th of January along with a Mr. J. H. Lee.

In the first trial there seemed to have been some question as to whether or not Marshall was actually killed by coming in contact with the semaphore post. There was no evidence offered showing any blow to any part of his body which might have been caused by striking the semaphore post. Between the first and the second trial the body of Marshall was exhumed by Dr. Powe who performed an autopsy. The skull was removed and actually produced in Court. The back of the head was crushed in, its condition indicating that it had received a terriffic blow near the place it joined with the spine. The neck was broken and the head was "disarticulated" from the spine. This new evidence was important to the plaintiff because it showed that the semaphore was struck and had blood upon it as well as other marks and that the skull of the deceased received a terriffic blow at the base of it sufficient to crush it in and sever the head from the spine. All doubt was removed as to whether Marshall was actually killed by contact with the semaphore post.

The exceptions of the defendant are five in number which will be taken up in their order.

Exception 1 alleges error on the part of the Circuit Judge in admitting in the evidence, over the objection of the defendant, the seventh paragraph of the defendant's answer set forth supra.

In the consideration of this exception it is well to note that the answer of the defendant was not a general denial but was a qualified denial. The second paragraph of the answer states: "it denies each and every other allegation in said complaint not hereinabove or hereinafter specifically admitted." It will be seen from the wording of the para-

graph of the answer and a consideration of the decisions of this Court that the answer was not a general denial under the rule laid down by this Court, Judge Cothran speaking, in the case of Blake against Southern Railway, 126 S. C., 407. The Court there said:

"The so-called general denial in the first defense is limited by its terms to such allegations as may not 'hereinafter be admitted'; those that are admitted, including the allegations of interstate employment, are excepted from the force of the general denial by its terms."

Nowhere in the answer of the defendant is it denied that the plaintiff's intestate came to his death while doing the things which were alleged in the complaint in part. In fact, the answer of the defendant expressly affirmed and admitted that he was killed and then set forth in paragraph 7 and stated in what respects he was negligent and stated the facts upon which such conclusions were based.

It is true that where there is a general denial and afterwards inconsistent defenses are set up this Court has held repeatedly that the facts stated in such inconsistent defenses are not substantive facts by way of admissions but where the denial is qualified as it is here and admissions are made in the answer of the defendant which are not specifically denied in a denial, this Court has held that such admissions are competent in evidence insofar as the same refer to facts and not legal conclusions. This is the rule laid down in the case of McJimpsey against Southern Railway, 89 S. C. 122, where an answer somewhat similar in form to the answer here under consideration is construed. This rule has also been recognized in the Federal Court where it has been held that the scope and sufficiency of the pleadings are governed by the practice of the states in which the trial is held.

Glenn v. Sumner, 132 U. S. 152, 33 Law Ed. 301. Following the decisions of both Federal and State Courts the matters set up in an affirmative defense where there has been no general denial but where the defendant has plead, denying only such matters as were not thereinafter specifically admitted, such admissions on the part of the defendant there may be offered in evidence by the plaintiff.

The second exception complains of error on the part of the Circuit Judge in refusing to charge as follows:

"I charge you that the jury cannot consider the allegations of defendant's answer in regard to contributory negligence as evidence against it and that the statements in paragraph 7 cannot be considered as evidence in the case."

This exception is disposed of by the disposition of exception 1.

The third exception alleges error on the part of the Circuit Judge in refusing to direct a verdict for the defendant on the ground that no actionable negligence had been proven on the part of the defendant in the cause.

A careful analysis of the evidence is convincing that this exception cannot be sustained. It was shown that the base of the semaphore was four feet ten inches (4′ 10″) from the track, only ten (10) inches more than the minimum allowed by the Railroad Commission; that when the train was running twenty or twenty-five miles an hour the car swayed from eight (8) to twenty (20) inches. Under the testimony the car projected beyond the track a distance of two feet four inches (2′ 4″) with the latter two and one half (2½) inches more, making a total projection of two feet six and one-half inches (2′ 6½″); that when the car was at rest the clearance between the semaphore and the ladder was two feet — and one-half inches (2′ 3½″); that the clearance when the car was moving at a rate of twenty (20) or twenty-five (25) miles per hour would be from one foot seven and one-half inches (1′ 7½″) to seven and one-half (7½″) inches. Taking into consideration the swaying, of course, and the thickness of a man's body, the jury could have well concluded that the semaphore was placed within an unsafe distance of a moving train.

This is distinguishable from the case of Southern Pacific Company against Berkshire, 254 U. S., 415, 65 Law Ed., 335, where the engineer was killed by being struck on the head by a mail crane while leaning out the window of his cab. The crane had been erected in accordance with the regulations of the post office department. The Court there stated that the decision was confined to the case of postal cranes. There are but a few postal cranes along the route of an engineer. At each one of them the train on occasions

"snatches" mail and they are clearly visible and known to the engineer as he approaches them. It is as much his duty to know of the existence of the postal cranes as it is his duty to know of the existence of a crossing and an engineer assumes the risk of being struck by one of these cranes which he passes constantly. The case of a semaphore is entirely different, for who could expect a switchman or brakeman or trainman to know the exact location of these posts and boxes which are sometimes close together and which are placed at regular and irregular intervals all along the railroad Right of Way. The case of Chesapeake & Ohio Railroad Company against Leitch is another case involving a mail crane and follows under the same proposition as announced in the Berkshire case.

It might be well here to consider also that if a mail crane was put further back that it would be impossible for it to perform the functions for which it is intended, to-wit: "Snatch" the mail from the mail cars. The mail crane must of necessity be in close proximity of the Right of Way and it would be impossible for the railroad company to place it in any other position and in addition would be in direct violation of the postal regulations.

In the absence of proof that it was fully known and appreciated by him, we do not think that the deceased assumed as a matter of law, such an extraordinary risk as this, a risk which the railroad company could have by due care avoided.

The defendant company invokes the order of the railroad commission in substantiation of its position with reference to the placing of the semaphore post. These regulations are not conclusive for the reason that they merely state the minimum distance which obstructions are allowed to be placed from the outer edge of the rail whereas the postal regulations state the exact distance that the mail crane must be placed. There was nothing to prevent the defendant from placing the semaphore post further back if it knew or should have known that it was dangerous in the position which it was.

This also disposes of the fourth exception as to assumption of risk.

The fifth exception alleges error in the refusal of the Circuit Judge to direct a verdict for the defendant on the

ground that there was no evidence showing how the deceased came to his death, or as to the proximate cause thereof.

There are very few cases where a trainman is killed that can be proven except by circumstantial evidence. Very seldom is more than one man sent to perform a particular duty on the train and if he is killed there is usually no living eye witness to testify, and only the mute, unmovable circumstances can be adduced to show the cause and manner of his death. In the consideration of this matter it must be kept in mind that the degree of proof required of circumstantial evidence is not and should not be as great in civil cases as in criminal cases. In criminal cases the presumption of innocence arises in favor of the defendant and the circumstances must be of such force and character as to convince the jury beyond a reasonable doubt of the guilt of the accused. In civil cases where there is no presumption and where the proof merely has to be by the preponderance or greater weight of the evidence it would be harsh and unjust to hold that the criminal circumstantial rule should be invoked. The weight to be given to the circumstances should be determined by the jury and if from that weight they determine that the plaintiff has proven his case by the preponderance of the evidence, such finding should not be disturbed.

Fortunately, for the plaintiff in this case, the circumstances are so many and so well knit together that a Judge would be required to submit the facts and circumstances to a jury even in a criminal case. We have a strong young man twenty-five years of age, healthy and able-bodied, in good health and apparent good spirits at the beginning of the trip with no known physical infirmity or defect; he is found dead beside the railroad track a few moments after having been seen alive by his companions. The dew on the ground is disturbed, the semaphore post shows unmistakable evidence of having been struck and there is evidence of human blood upon it; the skull of the deceased is found crushed, evidently from a lick of some terrific force. This tends to establish the rate of speed of the train, the fact that the post was too close to the track, that the deceased was on the side of the car riding where he had a right to ride and where his duty often called him to ride and at a place provided for him to ride upon, that the cars were

swaying and that his head came into collision with the semaphore post with a terrific blow and caused him to be killed. Foggy and dark, the eye of man could not see and the eye of God will not disclose the exact manner of his death but these mute and silent circumstances, unchanged and unchangeable, speak silently of the manner and circumstances thereof.

This case is a much stronger case than the case of Chicago M. & St. P. R. Co. against Coogan, 271, U. S., 472, 70 Law Ed. 1041. In the Coogan case the deceased was found near the west end of the second car from the caboose, lying parallel with the track outside the south rail and on or at the ends of the ties. There were indications to show that he had been between the rails; that he had been run over by the east truck of the car next to the cab; that his left leg and arm had been crushed between the wheel and the rail and that his body had been dragged about fifteen feet.

The theory of the plaintiff was that Coogan stepped between the rails with his right foot, leaving his left foot outside the south rail between the south rail and a certain pipe line; that he stooped to raise the air hose, his left foot slipping backwards under the bent pipe; that before he could make the coupling the car started backwards to clear the switch and that as he attempted to straighten up his left foot was caught under the pipe and he was forced backward, run over and killed. The sole ground of negligence was the presence of the bent pipe along the track of the defendant. Coogan's shoes were removed from his feet and placed in a garage where they remained for a number of days before they were examined. The condition of the left shoe before the accident was not known and several days afterwards a rounding depression was noticed on the counter of the shoe. There was no evidence as to the condition of the shoe before the accident. There was no evidence that the shoe had been kept in the same condition after the accident. Assuming that the depression in the shoe counter was made by contact with the bent pipe, there was nothing to indicate that it was made before or after he was knocked down by the train. There was nothing to indicate whether the depression was not made some time before. Suppose the shoe had been torn, the foot had been lacerated and on the pipe

had been found leather from the shoe and blood from the foot, the case would not have then been as strong as the case here under consideration.

The present case reversed and remanded for a new trial by the United States Supreme Court under the authority of the following cases:

Chicago, M. & St. P. R. Co., v. Coogan, Supra;
Sou. Pac. Co. v. Berkshire and Chesapeake & Ohio Co. v. Leitch, Supra;
Gulf, C. & S. F. R. Co. v. Moser, 275 U. S., 133, 72 Law. Ed. 200, 48 Sup. Ct. Rep., 49.

The first case, Coogan, is on the question of the quantity and quality of the evidence and, as I have attempted to demonstrate heretofore, the case now under consideration is a much stronger case than the Coogan case. In the Coogan case there was presumption built upon presumption, supposition upon supposition; at best the case was only a good theory and not sustained by any positive facts.

The Berkshire case and the Leitch case are both on the question of assumption of risk and, as I have attempted to demonstrate, do not control this case. It is well to note here also that at the former trial, Tyner against A. C. L. R. Co., Supra, there was a question as to the charge upon assumption of risk. This is disposed of at pages 105-108 inclusive of that decision. There is no question here as to any error in the charge with reference to assumption of risk and if the United States Supreme Court intended to direct a verdict on the ground of assumption of risk it is not so stated in its decision. I cannot but feel that the United States Supreme Court intended just what was written in the decision, to remand the case for a new trial on this ground.

The Moser case is with reference to the measure of damages and as to error in the charge in the Tyner case. There is no question that under the Federal Rule, as applied to the Federal Employers Liability Act, the Judge in the first trial clearly failed to charge the proper measure of damages. The decision of the United States Supreme Court was that the case should be reversed and remanded for a new trial, having in mind the questions which are decided in the cases cited.

In passing it might be well to consider for a moment the reason for the passage of the Federal Employers Liability Act. It was passed for the purpose of enlarging, not limiting the rights of the employees to recover against railroad companies when engaged in interstate commerce. Numbers of rights were conferred by this Act of Congress which did not exist prior to its passage. The plaintiff was permitted to bring his suit in the State Courts and not to be subject to removal to the Federal Court. He was to be relieved of the burden of being carried out of the County of his choice into the Federal Court where it would be both inconvenient and expensive to carry on the litigation. The doctrine of fellow-servant was abolished entirely by the terms of the Act itself. Contributory negligence ceased to be a complete defense as it is under the South Carolina law but could be considered in diminution of damages only under the standard fixed by Congress in the trial of these cases. The suit was limited in favor of those who were dependent upon the deceased or the injured person for support, clearly indicating that it was the purpose of Congress to grant that broad and comprehensive relief to the dependents of one killed or injured in the service of his employer which was not permitted formerly under the State and Federal decisions. It was to be a shield to the working man to give him additional security that upon being killed in the line of his duties his dependents would not suffer by reason of it. The amount of recovery was limited to actual damages so that the scope of the act could not be enlarged by capricious or prejudiced jurors. The appeal was made ultimately to the highest Court in the land so that this great Judicial body could overlook and supervise the operation of the Act in accordance with the intention of its framers. It was and is one of the most progressive steps in Legislation of the Twentieth Century and stands today a monument to the progressive and humanitarian spirit which is characteristic of this new Century. Thousands of men have been benefited by its terms and thousands more will be benefited by its terms in the future. I feel that a construction should be given, broad and comprehensive, to carry out the real intent of the framers of the act and yet circumscribe it with such rules of law as will amply protect the employer under its terms.

All of the exceptions are, therefore, overruled and the case is affirmed.

(Let the exceptions be reported.)

Blease, Stabler and Carter, JJ., concur. Cothran, J., dissents.

COTHRAN, J. (dissenting):

Upon the former trial of the case, the defendant moved for a directed verdict upon the ground that the evidence as to the cause of decedent's death was wholly speculative and insufficient to show the proximate cause of his death.

In over-ruling the exceptions raising this issue, the Court in the opinion reported in 149 S. C. 89, made the following observations, in which I have italicized the evidence which appeared in that trial and which did not appear in this:

"We have already called attention to some of the evidence given in this case; we do not deem it necessary to review the entire testimony. Much of the evidence was circumstantial, but, taken as a whole, it was amply sufficient to carry the case to the jury. As stated, the evidence tended to show that the brakes on one of the cars were defective, a condition sufficiently dangerous to have caused a wreck; that this condition was discovered by the switchman, Marshall, who called the conductor's attention to it; that the train was stopped, and these two men attempted to rectify this defective condition; that the conductor did rectify same, as he thought, and went back to a place of safety; that the switchman did not return at once to the top of the car where he generally rode, but, inferentially, remained on the ladder attached to the side of the box car for the purpose of further watching and noting whether the brakes would work properly or continue to 'stick' and that the train of cars, running at a rate of from 20 to 25 miles per hour, which caused a sway of the empty box cars from 8 to 20 inches, passed the signal device located on the roadbed of the appellant while Marshall was on the ladder, and that thus he came in contact with the semaphore and was knocked from the ladder and killed * * *

"As we have already pointed out, the conductor testified that the last time he saw Marshall, which was before the

semaphore was reached, he was going up the ladder, and that he was found dead some feet from the semaphore. The testimony further tended to show that the dew had been brushed from the base of the semaphore, apparently through contact with some object. We think that the testimony, when considered as a whole, amply justified the jury in drawing the inference contended for by the respondent, that the decedent came to his death by reason of his being knocked from the ladder by the semaphore, and in drawing the further inference that, as *the switchman knew of the danger arising from the 'sticking' of the brakes, he had remained on the ladder for a few moments after the cars started in order to see whether the defective condition had been remedied, and whether there was any further danger from this cause, and that in so doing he was acting within the scope of his duties.*"

An examination of the record will show that not one of the facts above underscored, upon which this Court relied in its opinion, was presented upon the trial, from the result of which this appeal comes.

The plaintiff however did present the testimony of C. C. Tyner a brother-in-law of the deceased to the effect that about 1:30 P. M. of the day of the accident, (it having occurred in the early hours of the morning of that day, before day-light), upon an examination of the semaphore, he discovered about four feet from the base that something had apparently wiped the smoke and soot from the semaphore and that about six or seven inches higher up there were apparently blood-stains on the north side of the semaphore casing; that he examined the body of the deceased and found a pad on the back of the head and two blood-clots on each of the pad-; that the head was crushed in and soft.

The plaintiff, a physician also testified that he assisted in exhuming the body between the two trials, presented the skull in evidence, and testified that the back of the head was crushed in as if from a severe blow.

These witnesses were not produced and examined at the first trial; and it is contended that their testimony, complementary to the circumstances above indicated in *italics*, made it an issue of fact for the jury, whether the death of

the deceased was caused in the manner alleged. The vice in this contention is that *the circumstances referred to were not in evidence upon the second trial.*

The theory of the plaintiff's case, as indicated by the allegations of the complaint and by the argument of counsel, is as follows:

1. That the brakes on a certain car were defective;

2. That the train was stopped to repair the defect;

3. That as the train moved off the deceased mounted a ladder on the side of a box car to see that the brakes had been properly repaired.

4. That as the train passed the semaphore the deceased came in contact with the semaphore and was killed.

As to the first three elements of the theory there is not a particle of evidence; as to the fourth, there is none other than the facts that the body of the switchman was found alongside of the track, some 25 feet south of the semaphore, the back of his head crus-ed in as from a severe blow; that there were apparently, (discovered some 12 hours in the day), blood-stains upon the north side of the semaphore casing, about 4½ feet from the base; and that the dew, dust or soot had been wiped off by something at a point 4 feet from the base.

It does not clearly appear that the spots upon the semaphore were blood-stains; in fact it is inconceivable that if, as theorized, the de*d*eceased, as the train moved off, climbed upon the ladder of a box car to watch the brakes which were defective and had been repaired, and was struck in the back of the head by the semaphore, blood would so quickly have spurted out and stained the semaphore; the removal of the dew, dust or soot can mean nothing.

There is not a particle of evidence that he was on a train or car at or shortly before the time he was killed, or was on the top or side of a moving car, or on a ladder or in any other position, moving or standing, where he could have been struck by the semaphore.

In connection with this phase of the case it is interesting to note the case of R. Co. v. Coogan 271 U. S. 472, one of the cases cited by the Supreme Court of the United States upon the authority of which the judgment of this Court was

reversed. The Court must have cited it in sustaining the defendant's position that there was not sufficient evidence that the deceased met his death by means of some instrumentality of the railroad company, as that was the main point decided in the Coogan case.

In that case, quoting from the opinion:

"At the close of all the evidence, petitioner moved the Court to direct a verdict in its favor, on the ground among others, that respondent had failed to prove any actionable negligence on the part of petitioner, and that any verdict for respondent would be based upon speculation and conjecture."

The motion was denied; a verdict for the plaintiff followed which was affirmed by the Snpreme Court of Minnesota and upon certiorari was reversed by the Supreme Court of the United States upon the ground taken by the railroad company, that "the evidence" is not sufficient to sustain a finding that any negligence on its part caused or contributed to cause the death"; the Court holding:

"The kind or amount of evidence required to establish it, is not subject to the control of the several states. This Court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that carrier's negligence was a cause of the death, judgment against the carrier will be reversed"; a rule recognized by this Court in the case of Shiver v. R. Co., opinion filed April 3, 1930 and not yet reported, and in which the Court said: "The evidence as to his death, and as to the cause of it, was speculative and it was not sufficient to show the proximate cause thereof."

The facts of the Coogan case are sufficiently detailed in the opinion of Mr. Justice Graydon and I need not repeat them. In fine the Court held that there was a hiatus in the proof in that it did not appear that the foot of the deceased was caught in the admittedly defective pipe line, the Court saying:

"As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence

is relied upon to prove a fact, the circumstances must be proved and not themselves presumed."

To sustain the plaintiff's theory that the deceased came in contact with the semaphore, the circumstances, of which there is not a particle of evidence, must be presumed; that the brakes were defective; that the train was stopped to repair them; that the deceased climbed the ladder and was leaning out in his investigation of the brakes after the train started. Even with some if not all of these circumstances appearing before the Supreme Court of the United States, it cited the Coogan case in support of its reversal. With how much more reason would it do so in the absence, upon the present trial, of every circumstance except that the deceased might have received his wound under the circumstances stated which only exist by unsupported presumption or assumption.

In Northern R. Co. v. Page, 274 U. S. 65, the Court held:

"Under familiar rules, plaintiff was entitled to prevail if the evidence and the inferences that a jury might legitimately draw from it were fairly and reasonably sufficient to warrant a finding in his favor. Otherwise the judgment must be for the defendant. (Citing the Coogan case.) The verdict cannot be sustained if essential facts are left in the realm of conjecture and speculation." (Citing R. Co. v. Mills 271 U. S. 347.)

It is insisted on behalf of the plaintiff however, that the seventh paragraph of the defendant's answer, in which its plea of contributory negligence was amplified, and which was admitted in evidence by the presiding Judge over the defendant's objection, contains specific allegations to the effect that the deceased was ordered by the conductor to ascend the ladder on the side of the car and take a position upon the roof; that instead of doing so he remained upon the ladder and leant outward from it so far as to bring his body in contact with the semaphore, which was erected even a greater distance from the track than is required by the regulations of the State Railroad Commission; and that these allegations supplied the hiatus in the evidence which the defendant now asserts to exist.

It is conceded in the opinion of Mr. Justice Graydon that where the defendant sets up a general denial to the allega-

tions of the complaint and follows it with an affirmative defence containing allegations of fact inconsistent with the general denial, in the nature of admissions of fact stated in the complaint, such allegations of fact are not admissible in evidence on behalf of the plaintiff to sustain the allegations of the complaint; he insists however that where the denial is qualified as he claims it to be in the present case, such allegations of facts are admissible for the purpose stated.

In support of this proposition the learned Justice cites two South Carolina cases which I do not think at all sustain the proposition, namely McJimpsey v. Southern Ry. 89 S. C. 122, and Blake v. Southern Ry. 126 S. C. 407.

In the McJimpsey case the action was against certain railroad company which had leased its property to another company upon a cause of action which arose in North Carolina, based upon the negligence of the lessee company toward a passenger. The lessor company, the defendant in the case, moved for a non-suit upon the ground that there was no evidence tending to show any delict upon its part and the alleged injury having occurred in North Carolina it did not appear that under the laws of that State the lessor company was liable for the delicts of the lessee company. But in the answer of the lessor company containing allegations intended to show that the injury was due solely to the negligence of the passenger, it was admitted that the passenger at the time of his injury was on a train of the lessor company. This allegation had followed a paragraph in the answer which denied "every material allegation of the complaint". The Court held it was doubtful whether this constituted a good general denial because of the qualification leaving it uncertain what the defendant considered material; but passing that by as no motion to make the answer definite was made, the allegation in the answer that the occurrence was upon a car of the defendant was considered an admission on the part of the defendant.

It is apparent that the admission in the answer was not made in the statement of an affirmative defence.

In the Blake case the situation was entirely different as appears from the syllabus which correctly reflects the con-

clusion of the Court. It is there stated that where in an action under the Federal Employers' Liability Act the plaintiff alleged the interstate employment of the plaintiff and the defendant's general denial was limited to such allegations as may not thereinafter be admitted, and the defendant's second defence specifically stated that the plaintiff was employed by the defendant in interstate commerce, the interstate employment was an admitted fact.

In Bliss on Code Pleading, (3rd Ed.) section 331, it is stated that while there is criticism of an answer which denies each and every allegation of the complaint not expressly admitted or denied, the defect does not exclude evidence supporting the denial, but that the remedy of the plaintiff is to require the answer made more definite. The author further states that there can be no valid objection to an admission of certain facts and a general denial of all others, provided it distinctly appears what facts are admitted and what denied.

In Bessemer Co. v. Woolley (Col.) 105 Am. St. 91, a denial of each and every allegation of the complaint not theretofore specifically admitted was held good as a general denial.

So in Comes v. R. Co. (Iowa) 43 N. W. 235 where the denial was of each and every other allegation contained in said petition not hereinbefore admitted.

So in Calhoun v. Hallen 25 Hun. (N. Y.) 155 where the denial was of each and every allegation set forth in the complaint except as herein admitted, qualified or explained.

So in Rouscher v. Hudson 4th Ohio Dec. 291 where the denial was of each and every other allegation and averment in said cross petition contained except as hereinbefore expressly admitted or denied.

So in Pittinger v. Association 44 N. Y. S. 124 where the denial was of each and every allegation in said complaint contained not hereinbefore or hereinafter admitted, denied or controverted.

So in Leuddenman v. Rudolf (Oregon) 155 Pac. 172 where the denial was except as hereinafter admitted, stated or qualified the defendant denies each and every allegation within the amended complaint of the plaintiffs contained.

So in Childers v. Bank (Ind.) 46 N. E. 825 where the paragraph of an answer denied every allegation of the complaint not admitted in such paragraph.

Under these authorities I do not think that there can be a question but that the denial in the present case was a general denial, subject perhaps to a motion by the plaintiff to make it more definite and certain, in the absence of which, it will prevent the admission of the defendant in his affirmative defence being used against him in support of the plaintiff's case. This seems to be the rule in Stanley v. Shoolbred 25 S. C. 181, Brock v. Nelson 29 S. C. 49, Gilreath v. Furman 57 S. C. 289, Charping v. Toxaway 70 S. C. 470, Hickson v. Early 62 S. C. 42, Glenn v. Sumner 132 U. S. 152.

In the case of Glenn v. Sumner 132 U. S. 152, the Court said:

"This explicit finding cannot be controlled by statements of fact in those parts of the answer which set up as independent defences matters in avoidance, or in a bill of exceptions relating to one of those defences only. Such statements, made for the purpose of presenting the issue to which they relate are not evidence upon any other issue in the same record. As held by Chief Justice Marshall, sitting in the Circuit Court for the District of North Carolina, where the law authorizes a defendant to plead several pleas, he may use each plea in his defence, and the admissions unavoidably contained in one cannot be used against him in another."

In Hickson v. Early 62 S. C. 42, the Court citing the Glenn v. Sumner case said:

"The same principle would, of course, apply to a case in which separate and distinct defenses are set up in the answer, and there is a demurrer to two or more of the several defences, which is the case here. See Stanley v. Shoolbred, 25 S. C., 181, where it was held that where the defendant pleads a general denial and a further defense by way of confession and avoidance, the admissions made in the latter defense cannot be used by plaintiff to establish the issues raised by the general denial."

In Lee v. Robinson (C. C. A.) L. R. A. 1916-C 358, the Court also citing Glenn v. Sumner, said:

"It is true that, where the law authorizes a defendant to set up several pleas, he may use each plea in his defense,

and the admissions unavoidably contained in one cannot be used against him in another."

In Smith v. Gale 144 U. S. 509, the Court also citing Glenn v. Sumner, said:

"It is true that when a general denial is pleaded in connection with a special defence of new matter, or two inconsistent defences are set up, the admissions in the one cannot be used to destroy the effect of the other."

In Wyoming Co. v. Buffalo Co. (WY.) 166 Pac. 391, it was held quoting syllabus:

"Admissions contained in a defense of new matter requisite for the introduction of such new matter in defense are not inconsistent with a denial pleaded in a separate defense in the same answer, and cannot be used to defeat such denial; hence a defendant may both deny and avoid, although the avoidance is a tacit admission of what is denied."

In Rudd v. Dewey, 121 Iowa, 454, 96 N. W. 973, the Court said:

"But even in states where inconsistent defenses are not allowed, the remedy is by motion to strike or to require an election; and, if the two defenses are allowed to stand, the colorable confession in one division, which is introduced or impelled in order to support matter in avoidance, does not waive the general denial pleaded in another."

In 2 Enc. Law & Practice it is said:

"While there is some conflict on the question, the great weight of authority, both at common law and under the statutes, favors the doctrine that, where several inconsistent pleas are filed, the admissions in one are not competent as evidence to rebut a repugnant averment in another."

The authorities upon which the author arrives at this conclusion are cited in the notes. In 1 Elliott on Evidence, section 236, it is stated:

"There is much reason in support of the view that where the law authorizes a party to plead in his way, as, for instance, where it authorizes him to set up independent and

even inconsistent defenses in different paragraphs of answer, the statements in a particular paragraph are made for the purpose of presenting the issue to which they relate, and no other, and to permit them to be used against the pleader on another issue would deprive him of his denials or at least make it dangerous for him to do what the law authorizes him to do. He may, for instance, plead by way of denial in one paragraph and by way of confession and avoidance in another, and it would seem unjust to permit his unavoidable and, in a sense, conditional admissions in the latter paragraph to be taken as admissions upon the issue raised by the denial. This seems to be the view taken by most of the courts by which the question has been expressly decided."

In Pomeroy's Code Remedies (3rd Ed.) section 724, the rule is stated:

"When a denial is pleaded in connection with a defense of new matter, or two defenses of new matter are set up, the admission in the one can never be used to destroy the effect of the other. The concessions of a defense by way of confession and avoidance do not obviate the necessity of proving the averments contradicted by the denial. This rule is universal. Even in those states where inconsistent defenses are not permitted to stand, the remedy is by striking out, or by compelling an election, and not by using the admissions of one to destroy the issues raised by the other."

See extended note 14 A. L. R. 80.

I think therefore that the admission in the defence of contributory negligence, can add nothing to supply the fatal hiatus in the evidence, and that clearly the presiding Judge was in error in admitting the seventh paragraph of the answer in evidence. In passing, it appears anomalous to practically strike the defence of contributory negligence from the answer and allow the use of a part of it an an admission of a material fact which the plaintiff was obliged to prove.

But assuming for the moment that the evidence shows that the train was equipped with a defective brake in one of the cars; that before reaching the semaphore the train was stopped and the brake repaired; that the deceased was

not entirely satisfied with the efficiency of the repairs and mounted the ladder to observe the action of the brake after the train started; that while engaged in that duty he leant over far enough to come in contact with the semaphore and was killed; I think that his death cannot be charged to the railroad company.

It is conceded that the semaphore was constructed at a greater distance from the nearest rail than four feet, the minimum distance fixed by the order of the Railroad Commission which had jurisdiction of such a regulation.

It has been consistently and properly held by this Court that the failure of a railroad company to comply with a regulatory statute in the operation of its trains, the signaling statute for instance, is negligence per se. and in the McBride case, 140 S. C. 260, it was decided, not only this, but that it created a presumption that the failure was the proximate cause, (a conclusion with which I did not agree in that case). It would appear logical and just therefore that when the railroad company complied with the statute or authorized regulation, it should be entitled to a similar presumption of due care.

I do not contend that the railroad company, in every instance, is absolved by showing compliance with such a regulation; circumstances may be presented which call for additional precautions, and I think that such has been holding of this Court. At any rate, such circumstances must be made to appear.

It is declared in the opinion of Mr. Justice Graydon that there was evidence from which the jury would have been justified in concluding that the semaphore was placed "within an unsafe distance of a moving train." This declaration is based upon the theory that the clearance between the side of a car standing at rest upon the track opposite the semaphore was 30 inches; that this clearance was reduced by the thickness of the ladder, 2½ inches, leaving 27½ inches; and that it was further reduced by the swaying of a car from side to side, in a train running at the rate of 25 miles an hour from 8 to 20 inches; that if the swaying was 8 inches, the clearance would have been 19½ inches; if 20, 7½ inches; and that considering the thickness of a man's body, the semaphore was placed too close to the track.

As applied to this particular case, the theory is based upon several assumptions, none of which appear in the evidence; that the deceased was upon the ladder; that the train was running 25 miles an hour; and that the sway of the passing car was so many inches.

There is no evidence how far the train stopped north of the semaphore, if it stopped at all; there is no evidence where the deceased mounted the ladder, if indeed he mounted it at all; there is no evidence that between the assumed stopping and the assumed mounting, the speed of the train had reached 25 miles an hour; there is no evidence as to how great the swaying of the car was or that the swaying, alternately as it appears, was toward the semaphore. It is all speculation and conjecture.

It is difficult if not impossible to differentiate the facts and conclusions which I think should be drawn in this case, from those in the case of Davis v. R. Co. 21 S. C. 93, which has been cited in many cases with approval by this Court, mainly upon other points. There the deceased was upon top of a car with a lantern flagging an approaching train; the cup of his lantern dropped out and he descended into the caboose to get another lantern; supplying himself with it he attempted by means of a ladder on the side of the caboose to return to his post on top; as he was ascending the ladder he was struck by the timbers of a water-tank and killed. There was evidence tending to show that the timbers were too close to the track but that a person might ascend it, hand over hand, with safety. A non-suit was ordered on circuit and affirmed by the Supreme Court. The non-suit was sustainable and was sustained upon this ground:

"Now in this case the deceased was knocked from the train and killed while he was upon the ladder on the outside of the car when the train was passing this structure, and, it is true, that such an accident could not have happened had the tank not been located as it was. But whether the danger of such an accident happening at that point and in that way was of such a character as to have required the company to locate this tank a few inches back, was a material fact in determining whether due care had been exercised, and consequently a material fact on the

question of negligence. In locating this tank, did ordinary or reasonable care or foresight demand that the company should foreknow, or even apprehend, that it was probable, remote or otherwise, that the lantern of a brakeman who was posted on the top of the conductor's cab, and required by the rules of the company to remain there, would go out just as the train was approaching this point, and at the moment that it swept by, that this brakeman, after descending to the cab for a second lantern, would be on the ladder returning to his position?

"It seems to us that these facts, or at least some facts showing the character of care that should have been bestowed, and that it was absent, the danger to be apprehended, and that it was not provided against, or something of that kind, were material facts on the question of negligence before that question could be properly submitted to a jury. But we find no testimony in the record directed to these points. The substance of the entire testimony is, that the tank was close enough to the track to strike one who happened to be on the outside of the car when the train was passing that point; that the deceased was on the outside at this precise moment and was killed; but there was no testimony that in locating this tank so near, the company, in view of such a conjuncture of circumstances, or of any danger resulting therefrom, failed to exercise reasonable care, such care as men ordinarily exercise in the conduct of business. In the absence of such testimony the non-suit was not without authority of law."

If it had appeared in that case that there was reasonable ground for the company to have apprehended that the deceased would make use of the ladder under such extraordinary circumstances, doubtless the non-suit would not have been sustained. The facts in the case at bar parallel the conditions presented in the Davis case. Assuming what I do not think there is a particle of evidence of, that the train stopped, that the switchman mounted the ladder and was knocked off, it is inconceivable that the company could reasonably have apprehended that the conditions which are claimed to have caused the accident would have existed at that particular time and place. It is not contended that the switchman was using the ladder for the purpose for

which it manifestly was intended, to ascend to the top of the car, but that he was using it for an inspection of the brakes upon a moving train. To hold the company liable it seems to me that the Court must hold that it must have anticipated that the train would stop to repair a defective brake; that after it had been repaired the switchman would mount the ladder, hold on to it and lean over to inspect the repaired brake, and that just at the moment that the particular car would reach the semaphore, the car, alternately swaying from side to side would sway toward the semaphore. It is conceded that for the purpose of ascending the ladder under normal conditions, there was abundant clearance between the track and the semaphore.

In R. Co. v. Thirouin (C. C. A.) 9 Fed. 2d 856, it was claimed that decedent was crushed between the girder of a bridge and a train on which he was riding at night, which had only eleven and one-half inches clearance above the train. Thirouin went back on the train before reaching the bridge to investigate sparks which were flying from the train and it was plaintiff's theory (just as it is plaintiff's theory in the present case) that he was leaning out looking for sparks and was struck by the bridge.

The Court reversing a judgment for the plaintiff said:

"It follows that the clearance was sufficient for the purpose for which it was provided and insufficient and highly dangerous for personal use. Against the dangers of personal use, however, the railroad company was required to afford protection only to those of its servants whose duties called them there. * * * We have not found, nor has our attention been directed to, any testimony in the record showing or intimating that Thirouin's duties required him to go within the clearance, or to the end of the girder, or upon the bridge. It is argued that in searching for the trouble he may have leaned out beyond the car just as it came to the end of the bridge and that he may have leaned so far out that he was struck and swept off the train by the center girder. That may be true, but there is no evidence to prove it. Blood on one end of a girder and a foot at the other end of the same girder and the body on the opposite side of the track against another girder open a

wide field for speculation as to how the accident happened and leave nothing certain except the fact of injury and death."

See also:

Reading Co. v. Boyer, 6 Fed. (2d) 185.
Bennett v. Washington Terminal Co., 2 Fed. (2d) 913.
Atlantic Coast Line R. Co. v. Wimberly, 273 U. S. 673.

The latter case involved the death of a brakeman who went out of the cab along the running board and down on the cow catcher to get off the train while it was slowly moving in the night-time, to throw a switch. He was found dead under the train some distance before reaching the switch. The North Carolina Supreme Court (190 N. C. 440) found ample evidence of liability, but its judgment was reversed by the United States Supreme Court on the authority of the Coogan case and other cases.

The case of R. Co. v. Berkshire 254 U. S. 415, which also was among the cases upon the authority of which the former judgment of this Court in 149 S. C. 89 was reversed by the Supreme Court of the United States, can only be applicable to the case at bar by interpreting it as conclusive of the issues presented for the second time in the present appeal. In that case the deceased engineer, leaning out of the side window of his cab, in the discharge of his duty to see the condition of a hot driving-pin, was struck on the head by the end of the horizontally extended arm of a mail crane and instantly killed. The syllabus of the case is as follows:

"The installation of railway mail cranes so close to the track that the arm of a crane when extended comes as near as 14 inches to the window of an engine cab, thus becoming a source of danger to the engineer while in performance of his duty, is not negligence upon the part of the railroad company as respects its employees, when such placing of the cranes is uniform along the railroad, and done by the direction of the Post Office Department pursuant to a plan it found necessary in handling the mails."

The clearance in the case at bar not deducting anything for the claimed swaying of the car, was 27½ inches, while that in the Berkshire case was only 14.

The Berkshire case was re-affirmed in the case of R. Co. v. Leitch 276 U. S. 429, which also was among the cases upon the authority of which the former judgment of this Court was reversed by the Supreme Court of the United States. In it the clearance of the mail crane was 10 inches.

It is mildly suggested that the fact that both the Berkshire case and the Leitch case involved postal cranes and not semaphores creates a distinction between them and the case at bar. All three involve the same question of the erection and maintenance of structures near the track and it is not perceived whether the structure is a mail crane or a semaphore can make the least possible difference.

As both cases were cited as authority for reversal it appears without doubt that the principles announced were intended to be applied to the case then under consideration.

The case of R. Co. v. Allen, 276 U. S. 165 is pertinent. It involved injury to a yard employe who was struck and injured by a shunted car while between the tracks. One ground of negligence alleged and submitted was that the tracks were so close together that an employe between cars on the two tracks was in danger of being struck. On this question the United States Supreme Court said:

"The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. * * * (Citing cases.) Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. * * * (Citing cases.) Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks,

* * * The court erred in submitting that question to the jury."

Upon the issue of assumption of risk the undisputed evidence shows that decedent, Marshall, was an experienced railroad man and had worked in the Charleston yards as a switchman three weeks at the time he was killed and for about three months before that time at the same place, and had also worked for appellant as switchman for about two years at Florence. Decedent, while working as a switchman, necessarily went out past these semaphor-s. There was testimony that all freight cars running at a speed of 20 to 25 miles an hour sway from side to side from ten to twenty inches, and further testimony that all railroad men know that freight cars sway from side to side in that way, and also know about semaphores being along the side of the track. Rule No. 706 of the Railroad Company, which was in force at the time decedent was killed, requires all employees to inform themselves respecting "the location of all structures or obstructions along the line which will not clear them when on the top or sides of cars."

In reversing the judgment of this Court and ordering a new trial, the United States Supreme Court cited as one reason for its reversal, the case of C. & O. R. Co. v. Leitch, 276 U. S. page 429. This case, as heretofore pointed out, was a mail crane case and was decided both on the ground of assumed risk, as well as lack of negligence. The facts on the question of assumed risk are not materially different on the present appeal from the facts on the last appeal, and the decision of the United States Supreme Court in reversing the judgment on the prior trial, on the authority of the Leitch case is conclusive on the present appeal that the decedent assumed the risk of injury, as a matter of law. We again quote from the decision in the Leitch case:

"Of course it is answered that these general considerations should not exonerate the railroads from using such care as they can within the conditions. But it seems to be unjust to let the risk of a danger that in any event is imminent vary upon disputed evidence that the danger was brought an inch or two nearer than it would have been if a blue print adopted for the whole line had been fol-

lowed with a more precisely mathematical accuracy. In the Berkshire case the testimony for the plaintiff left a distance of fourteen inches from the end of the crane to the car. Here the plaintiff's witness makes it ten.

The witnesses for the petitioner with greater plausibility make is appreciably more. If there is to be a standard in these cases, and if, as decided, the general rule is that the engineer takes the risk, the railroad should not be made liable for this class of injury except where some unquestionable disregard of obvious precautions is shown."

The Berkshire case also was decided upon the issue of assumption of risk and like the Leitch case manifestly was intended to control the decision of the case.

For these reasons I think that the judgment should be reversed and the case remanded for the entry of judgment for the defendant under Rule 27.

THE STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

J. L. POWE, as Administrator of George A. Marshall, Deceased, Respondent,

VS.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

PRÆCIPE

To the clerk of the above-entitled Court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of:

1. The record on appeal in said cause:
2. The opinion of the Supreme Court of the State of South Carolina;
3. All journal entries contained in the records and proceedings of the Supreme Court of the State of South Carolina relating to said cause;

4. The final judgment and decision of the Supreme Court of the State of South Carolina;

5. Your certificate to the record that it is a complete record in said cause.

Dated this 10th day of November, 1930.

Hagood, Rivers & Young, Attorneys for Appellant, Atlantic Coast Line Railroad Company.

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

J. L. POWE, as Administrator of George A. Marshall, Deceased, Respondent,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

CLERK'S CERTIFICATE OF RECORD

I, J. B. Westbrook, Clerk of the Supreme Court of the State of South Carolina, do hereby certify that the foregoing, consisting of one hundred and four (104) numbered pages, is a true and correct transcript of the record on appeal to this Court, comprising the record on appeal from the Court of Common Pleas in and for Charleston County, South Carolina, to this Court, petition for stay of execution and enforcement of final judgment, order staying execution and enforcement of final judgment, bond, the opinion and final judgment of this Court on said appeal and præcipe for preparation of said record.

In witness whereof I have hereunto set my hand and affixed the seal of the Court, this eleventh day of November, nineteen hundred and thirty.

J. B. Westbrook, Clerk the Supreme Court of the State of South Carolina. (Seal Supreme Court of South Carolina.)

[fol. 106] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 19, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,522. South Carolina Supreme Court. Term No. 600. Atlantic Coast Line Railroad Company, petitioner, vs. J. L. Powe, as administrator of George A. Marshall, deceased. Petition for a writ of certiorari and exhibit thereto. Filed December 16, 1930. File No. 35,522.